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THE DOCTRINE

OF

ULTRA VIRES

ILLUSTRATED AND EXPLAINED BY SELECTED CASES, CLASSIFIED AND FULLY ANNOTATED.

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PREFACE.

THE importance of that branch of corporate law herein considered is universally recognized by the profession. The selection and annotation of cases is now a popular mode of presenting the law, and it would appear to be especially the most convenient and useful mode of illustrating the doctrine of ULTRA VIRES, about which there is much conflict in the decisions, and the application of which is frequently more or less qualified, or restricted, by the facts and circumstances of different classes of cases.

The classification made in this volume, corresponding with the different chapters, will enable the practitioner to readily find the decisions bearing upon the case he may have under consideration, and the selected cases and notes will furnish him with the conflicting decisions, if any, and any limitation or modification of the doctrine in its application to the class of cases under consideration. For instance, Chapter III illustrates the application of the doctrine to the contracts and torts of corporate carriers. The selected cases in the chapter are in conflict, but the reasons in support of the adverse views will be there found, and the notes thereto will furnish a full citation of authorities bearing upon the question, and indicate which

side of the controversy has the preponderance of argument and authority.

Thus may be conveniently found in the various chapters a consideration, and illustration, of the application of the doctrine in all cases likely to be presented for professional investigation.

G. W. FIELD.

Des Moines, September, 1881.

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ULTRA VIRES.

CHAPTER I.

ULTRA VIRES IN ITS APPLICATION IN SUITS ON CONTRACT FOR THE RECOVERY OF MONEY.

FIRST SELECTED CASE.

The East Anglian Railways Company v. The Eastern Counties Railway Company.*

A railway company incorporated by act of Parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated.

The defendants were incorporated by an act of Parliament, the first section of which enacted that certain persons should be united into a company for making and maintaining a certain railway and other works by the act authorized, according to the provisions and regulations thereinafter mentioned, and for that purpose should be one body corporate by the name and style of "The Eastern Counties Railway Company," and should have perpetual succession, and a common seal. The third section empowered the company to raise a sum of money "for making and maintaining the said railway, and other works authorized by the act." The fifth section directed that the money so raised should be expended in and towards making and maintaining the said railway, and other works, and in otherwise carrying the act into execution. And by subsequent

* Reported in 11 C. B., 775; 21 L. J. (N. S.), C. P., 28; 16 Jur., 249; 7 E. L. & Eq., 409 (1852).

sections it was provided that the profits, after defraying the expenses of making, maintaining, and working the railway, were to be accounted for and divided amongst the proprietors of the undertaking:

Held, That it was not competent to the directors to enter into a contract with another railway company, to take a lease of their line, and to pay the costs incurred by them in the soliciting and promoting of bills in Parliament for the extension and improvement of such other line of railway, even though such extension and improvement would benefit their own company; and that such contract, if entered into, was illegal and void, and could not be enforced in a court of law.

Covenant.—The declaration stated, that, theretofore, and before the making of the indenture thereinafter mentioned, and before the commencement of the suit, a certain bill for the construction of certain extensions, branches, and other works therein mentioned to be thereby authorized to be constructed; to-wit, a bill entitled "A bill to enable The Lynn and Ely Railway Company to extend their railway to Bury St. Edmunds," had been and was prepared by and on behalf of The Lynn and Ely Railway Company, and had been and was introduced by and upon the petition of the said last mentioned company into Parliament and into the House of Commons, and at the time of the making of the said indenture was pending in Parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof. That, theretofore, and before the making of the said indenture, and before the commencement of the suit, a certain other bill for the construction of certain extensions, branches, and other works therein metioned to be thereby authorized to be constructed; to-wit, a bill entitled "A bill to enable The Lynn and Ely Railway Company to extend their railway to Spalding and Holbeach," had been and was prepared by and on behalf of the said Lynn and Ely Railway Company, and had been and was introduced by and upon the petition of the said last mentioned company into Parliament and into the House of Commons, and at the time of the making of the said indenture was pending in Parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof. That, theretofore, and before the making of the said indenture, and before the commencement of the suit, a certain other bill for the construction of certain exten-

sions, branches, and other works therein mentioned to be thereby authorized to be constructed; to-wit, a bill entitled "A bill for making deviation in the line of The Lynn and Ely Railway Company, and for forming docks within the borough of King's Lynn," had been and was prepared by and on behalf of the said Lynn and Ely Railway Company, and had been and was introduced by and upon the petition of the last mentioned company into Parliament and into the House of Commons, and at the time of the making of the said indenture was pending in Parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof. That, theretofore, and before the making of the said indenture, and before the commencement of the suit, a certain other bill for the construction of certain extensions, branches, and other works therein mentioned and thereby authorized to be constructed; to-wit, a bill entitled "A bill to enable The Lynn and Ely Railway Company to make a navigation from Lynn to Wormegay, all in the county of Norfolk," had been and was prepared by and on behalf of the said Lynn and Ely Railway Company, and had been and was introduced by and upon the petitition of the said last mentioned company into Parliament and into the House of Commons, and at the time of the making of the said indenture was pending in Parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof. That, afterward, and before the commencement of the suit; to-wit, on the 26th day of February, 1847, by a certain indenture then made between the said Lynn and Ely Railway Company, The Ely and Huntingdon Railway Company, and the Lynn and Dereham Railway Company, of the one part, and the said Eastern Counties Railway Company, of the other part—one part of which said idenure, sealed with the common seal of the said last mentioned company, the plaintiffs brought into court, etc.—after reciting that the said Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham Railway companies, had agreed to amalgamate and form one company, under the name or style of "The East Anglian Railways Company," and that a bill was then pending in Parliament to give effect to such agreement; and also that the said Lynn and Ely,

Ely and Huntingdon, and Lynn and Dereham Railway Companies had agreed with the said Eastern Counties Railway Company to grant to the said Eastern Counties Railway Company a lease of their several railways, branch railways, and works, for the term and in manner thereinafter mentioned—each of them, the said Lyon and Ely, Ely and Huntingdon, and Lynn and Dereham Railway Companies, for themselves respectively, and for their respective successors and assigns, and so far as the several covenants, clauses and agreements thereinafter contained were or ought to be observed and performed by and on behalf of the said last mentioned companies respectively, and their successors and assigns, did covenant and agree with the said Eastern Counties Railway Company, their successors and assigns; and the said Eastern Counties Railway Company, for themselves, their successors and assigns, and so far as the several covenants, clauses and agreements thereinafter contained were or ought to be observed by and performed on the part of the said Eastern Counties Railway Company, their successors and assigns, did covenant and agree with the said Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham Railway Companies respectively, and each of them, their respective successors and assigns, in manner following; that is to say (amongst other things): 1. That in the said agreement, The East Anglian Railways Company should be taken and considered to mean The Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham Railway Companies, and The East Anglian Railways should be taken to mean the railways, branch railways, and works of said last mentioned companies, except such portion of the proposed line of the Ely and Huntingdon Railway as lies between St. Ives and Ely, and which The East Anglian Railways Company were not to construct. 2. That The East Anglian Railways should be leased to The Eastern Counties Railway Company for the term of 999 years, at such annual rent, and subject to such conditions as were thereinafter mentioned. 3. That the said term of 999 years should commence on the day when The East Anglian Railways should be certified by the commissioners of railways to be completed, and ready for opening. 4. That, for the first year of the said term, the annual rent should be of such

amount as would pay a clear annual dividend of 5*l.* per cent on 884,397*l.* 10*s.* (which should be considered as the share capital of The East Anglian Railways Company), and for the residue of the said term the annual rent should be of such an amount as would pay a clear annual dividend on such capital less by 2*l.* per cent than the dividend for the time being payable on the entire share capital of the said Eastern Counties Railway Company (now converted into 20*l.* shares); but the said Eastern Counties Railway Company should guarantee, that, after the expiration of the said first year, such annual rent should in no case be of less amount than would pay a clear annual dividend of 6*l.* per cent on the said share capital of the said East Anglian Railways Company. 6. That such annual rent should be paid to the said East Anglian Railways Company half yearly, on, etc. 12. That the said Eastern Counties Railway Company should find and provide all such further sums of money, over and above the said share capital of 884,397*l.* 10*s.* and such borrowed moneys as aforesaid, as might be necessary for completing the said East Anglian Railways, to such extent, and in such manner, as the said Eastern Counties Railway Company should fix and determine upon. 15. That the East Anglian Railways Company, or any of the companies constituting the same, should proceed with all such bills as had been introduced by them, and were then pending in Parliament for the construction of extensions, branches, or other works; and, in case such bills, or any of them, should pass into a law, the said East Anglian Railways Company should proceed to execute the extensions, branches, and other works, thereby authorized to be constructed; and such extensions, branches, and other works, when completed, should be transferred to the said Eastern Counties Railway Company. 16. That the said Eastern Counties Railway Company should find the capital necessary for the construction of said extensions, branches, and other works, and should also pay to the East Anglian Railways Company all the cost, charges, and expenses paid, sustained, or incurred by them in preparing or promoting the said bills so pending as aforesaid (and that whether such bills, or any of them, should pass into a law or not), and preliminary and incidental thereto; and also all costs, charges,

and expenses attending or incidental to the construction of such extensions, branches, and other works; and the respective certificates of the chairmen of the three companies constituting the said East Anglian Railways Company, of the amount of all and every such costs, charges, and expenses, should be binding on the Eastern Counties Railway Company. 17. That notwithstanding the provisions contained in the two last clauses thereof, the Eastern Counties Railway Company should have the power of staying all proceedings in relation to the said bills, or any of them, whenever they should think fit. 24. That all necessary and proper deeds for carrying the said agreement into full effect, should be prepared by some eminent, impartial conveyancer, and the common seals of the respective companies should be affixed thereto; and that such deeds should contain all usual and proper clauses, provisions, and covenants, and particularly clauses providing for the proper and efficient working of the said East Anglian Railways, and a general arbitration clause, for the purpose of settling all matters in difference between the respective companies, without having recourse to any court of law or equity, except to enforce the award made on arbitration.

The declaration then went on to allege, that the said bill firstly, thereinbefore mentioned; to-wit, the said bill entitled "A bill to enable the Lynn and Ely Railway Company to extend their railway to Bury St. Edmunds," was one of the said bills in the said indenture mentioned to have been introduced into and to be then pending in Parliament, as therein mentioned; that, after the making of the indenture, and before the commencement of the suit; to-wit, on the 2d of March, 1847, and for a long space of time thereafter; to-wit, one calendar month during the session of Parliament in the said indenture mentioned, and until the said bill firstly thereinbefore mentioned was lost, as thereinafter mentioned, the said Lynn and Ely Railway Company, in pursuance of said indenture, and of the covenant in that behalf on their part therein contained, and in manner and form therein mentioned, did promote and proceed with, and cause to be promoted and proceeded with, the same bill in Parliament, by causing the same bill to be, and the same was, read a first time in the said House of Commons, and also a second

time in the said House of Commons, and by further causing the same bill to be, and the same was, by the said house, committed and referred to a committee of the said house; that afterward and before the commencement of the suit; to-wit, on the 23d of March, 1847, the said committee found, resolved, and declared, that the preamble of the said last mentioned bill was not proved, and the said bill was consequently lost without and not by reason of any default of the said Lynn and Ely Railway Company, or of the plaintiffs; and that the said Lynn and Ely Railway Company, paid, sustained, and incurred certain moneys, costs, charges, and expenses, in the preparing and promoting, and preliminary and incidental to the said last mentioned bill, which said moneys, costs, charges, and expenses amounted in the whole; to-wit, to 2,000*l.*

The declaration then proceeded to state that the bill secondly thereinbefore mentioned, entitled "A bill to enable The Lynn and Ely Railway Company to extend their railway to Spalding and Holbeach," was prosecuted and proceeded with by The Lynn and Ely Railway Company, until, afterward, to-wit, on the 6th day of April, 1847, the defendants, in pursuance of the power in that behalf reserved to them by the said indenture, directed and requested The Lynn and Ely Railway Company to stay all further proceedings in relation to that bill; whereupon the same was not further promoted or proceeded with, and that The Lynn and Ely Railway Company sustained in relation thereto costs and expenses to the amount of 10,000*l.* That the bill thirdly thereinbefore mentioned, entitled "A bill making deviation in the line of The Lynn and Ely Railway, and for forming docks within the borough of King's Lynn," was, after the making of said indenture, and before the commencement of the suit, duly prosecuted, and on the 9th of July, 1847, was passed into and became an act of Parliament; and that The Lynn and Ely Railway Company incurred, in the prosecution and promotion thereof, costs and expenses to the amount of 10,000*l.* That the bill fourthly thereinbefore mentioned, entitled "A bill to enable The Lynn and Ely Railway Company to make a navigation from Lynn to Wormegay, all in the county of Norfolk," was duly prosecuted by The Lynn and Ely Railway Company, and was, on the 9th of July,

1847, passed into and became an act of Parliament; and that The Lynn and Ely Railway Company sustained costs and expenses in the prosecution and promotion thereof to the amount of 10,000*l.* That, afterward, and after the commencement of the suit; to-wit, on the 9th of August, 1847, it was proved to and certified by the commissioners of railways that one-half of the capital by the act and acts relating to each of them, the said Lynn and Ely Railway Company, the said Lynn and Dereham Railway Company, and the said Ely and Huntingdon Railway Company, authorized to be raised, had been paid up and expended for the purposes authorized by such act and acts respectively; and that, thereupon, "The East Anglian Railways Act, 1847," and the several provisions therein contained, took effect, and became and continued in full operation. That the total amount of all and singular moneys, costs, etc., paid, sustained and incurred by the said Lynn and Ely Railway Company in preparing and promoting the said four several thereinbefore mentioned bills, respectively, and preliminary and incidental thereto, was 21,184*l.* 16*s.* 2*d.*; and that, afterward, and after the said moneys, costs, etc., had been so paid, sustained and incurred as aforesaid, and before the commencement of the suit; to-wit, on the 1st day of January, 1850, there was, duly, and in all respects according to the terms of the said indenture, made and issued; to-wit, by the chairman of the said Lynn and Ely Railway Company, the said Lynn and Dereham Railway Company, and the said Ely and Huntingdon Railway Company, respectively, a certain certificate, as required by the said indenture, of the amount of all and every such moneys, costs, etc., whereby it was certified that the said last mentioned moneys, costs, etc., amounting, to-wit, to 21,184*l.* 16*s.* 2*d.*; and that, although afterward, and after the making and issuing of the said certificate; to-wit, on, etc., the defendants had due notice of the said making and issuing of the said certificate, and of the amount therein certified, as aforesaid, and although a reasonable time after such notice for the payment of the said last mentioned amount had elapsed before the commencement of the suit, yet the defendants, at the date and time at which the said East Anglian Railways Act, 1847, took effect and came into operation, had not paid to the

said Lynn and Ely Railway Company, nor had they since paid to the plaintiffs, the said last mentioned sum of money, or any part thereof, etc.

The defendants craved oyer of "the said indenture" in the declaration mentioned, and after setting it out, pleaded, That, at the commencement of this suit, no act of Parliament had been procured or obtained, nor was there in force any act of Parliament whereby the said East Anglian Railways Company, or the said Lynn and Ely Railway Company, or the said Ely and Huntingdon Railway Company, or the said Lynn and Dereham Railway Company, were or was authorized, or empowered to grant any lease of their said railways respectively, or of either or any part of such railways, to the said Eastern Counties Railway Company, and that before and at the time of the committing of the said alleged breaches of covenant, and each of them, the said Lynn and Ely Railway Company, the said Ely and Huntingdon Railway Company, and the said Lynn and Dereham Railway Company, and the said Eastern Counties Railway Company, and each of those companies, had been and were unable to procure or obtain any act of Parliament authorizing or empowering the granting of such lease as in the said indenture mentioned, or of any lease of the railways of the said three first mentioned companies respectively, or of any part thereof to the said Eastern Counties Railway Company; that the said three companies respectively had then, and had ever since wholly abandoned all intention of procuring or obtaining any act of parliament authorizing the leasing of the said railways respectively, or of any part thereof respectively, to the said Eastern Counties Railway Company; and that divers persons, to-wit: J. A., E. R. T., etc., etc., who, at the time of the making and executing of the said indenture, were shareholders of and in the said Eastern Counties Railway Company, and entitled to vote at general meetings of the said company, did not assent to the making or executing of the said indenture, or of the agreement therein set forth and contained—verification.

To this plea the plaintiffs demurred generally. The points marked in the margin were as follows: "The plaintiffs intend to argue that, supposing the facts set out in the plea to

be true, the plea affords no answer in law to the declaration, for that it was within the competence of the companies to agree for a lease to one of them, of the line of railways to the other of them; and that whether it were so or not, the rights of the plaintiffs to recover the costs and expenses sought to be recovered, is not thereby affected, as the covenant to pay them is an independent covenant, and not contingent upon the right to lease, or upon the leasing of the plaintiffs' railways; and that the deed did not require the assent of the individual shareholders named.

Bramwell (with whom was *T. Wheeler*), in support of the demurrer.—Two points will present themselves for the consideration of the court:

First. Whether the contract for the breach of which this action is brought was a legal contract, and one which it was competent to the plaintiffs and defendants respectively to enter into.

Secondly. Whether, assuming that there is no illegality in the contract, the defendants can escape from the performance of it, because certain of the shareholders in their company did not assent to its execution.

2. The argument on behalf of the defendants, as to the second point, resolves itself in this: That, by reason of the non-assent of some of its members, or shareholders, the deed is not the deed of the said Eastern Counties Railway Company. This objection, it is submitted, is not open to the defendants.

The declaration alleges that the defendants, by a certain indenture made between the plaintiffs and the defendants, sealed with the common seal of the defendants, covenanted, etc. The defendants crave oyer of "the said indenture in the declaration mentioned. They do not exercise the common caution usually observed in pleading, when it is intended to deny the deed, of calling it "the said *supposed* indenture;" and throughout the plea the document is referred to as "the said indenture," admitting it to be their deed. [MAULE, J.—It is no admission at all.] There is this additional reason why this defense should not be open to the defendants. It is meant to be said that this deed was *ultra vires* the directors. How does that appear

upon these pleadings? The Eastern Counties Railway Company is a company constituted by acts of Parliament, of which the court will take notice. These acts are framed with two views—the one, the regulation of the rights and duties of the company as between them and the public—the other, the regulation of the private rights of the shareholders or members of the company *inter se*. It is perfectly competent to the company to modify their rights by any collateral agreement which is not inconsistent with the acts of Parliament. Now, there is nothing inconsistent with the acts to suppose that the company previously agreed amongst themselves, that such a deed as this should not be avoided by the want of assent of some of their body; and it is not alleged that the plaintiffs had notice that this was *ultra vires*. [MAULE, J.—The plea is not demurred to specially, on the ground that it amounts to *non est factum*.] No: the general demurrer was the result of an arrangement between the parties.

1. The directors have entered into this contract under the common seal of the company. If a contract thus entered into can be avoided upon the ground here suggested, there is hardly any contract which a railway or other joint-stock company can enter into which would be binding upon them. *Smith v. The Hull Glass Company*, 8 C. B., 660 (E. C. L. R., Vol. 65), where it was held, that in an action brought against a joint-stock company completely registered under the 7 and 8 Vic., c. 110, for goods ordered by persons in their employ, and supplied for the purposes of the company, and used by them in their works, it is not necessary for the plaintiff to prove that the persons who gave the orders were authorized by the directors so to do, or that the contract was made pursuant to the provisions of the company's deed of settlement and by-laws, is to some extent an authority for the plaintiffs. [JERVIS, C. J.—The Court of Exchequer, in *Ridley v. The Plymouth, etc., Grinding and Baking Company*, 2 Exch., 711, had taken a different view of the question, and the matter is now pending in this court upon a special verdict.] This, however, is the case of a deed under the common seal of the company. [WILLIAMS, J., referred to *Clark v. The Imperial Gas Light Company*, 4 B. & Ad., 315 (E. C. L. R. Vol. 24), 1 N.

& M., 206 (E. C. L. R., Vol. 28), where Lord DENMAN intimated an opinion that a contract which had not been entered into with the formalities prescribed by the companies' act of incorporation could not be enforced against them.] *Hill v. The Manchester and Salford Water Works Company*, 2 B. & Ad., 544 (E. C. L. R., Vol. 22), is a much stronger case than the present; it was there held that, where a company authorized by act of Parliament to raise money for certain purposes, has given a bond purporting to be for a sum borrowed and advanced conformably to the act, it is not sufficient for them to plead to an action on such bond that it was executed colorably, and that the money was not in fact borrowed or lent for the purpose of the statute, as the obligee well knew, the pleas not disclosing any fraud or any injury done to the shareholders. Lord TENTERDEN there said: "I am not prepared to say that the company might not have been liable upon these bonds, even if they had been given without any view to the purposes expressed by the act; but the pleas do not raise that question. If the defendants meant to insist that the bonds were given for purposes unsanctioned by the act, and also prejudicial to the shareholders and mortgagees, that ought to have been shown." In a subsequent action between the same parties (5 B. & Ad., 866 (E. C. L. R., Vol. 27); 2 N. & M., 573 (E. C. L. R., Vol. 28), on a bond the condition of which recited that the company were by act of Parliament authorized to raise money by bond, and that at a general meeting of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded *non est factum;* and it was held, *first*, that although the company could not, under that plea, show that the bond executed by them was invalidated by collateral matters, they might show that it was void because executed contrary to the provisions of the act of Parliament; *secondly*, that a clause in the act of Parliament whereby the company were authorized, at any general or special general assembly to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require concurrence in each particular act of sealing, and that a bond

to which a seal had been affixed by the company's clerk, under a general authority from the directors, was valid. That case is an authority to show that if the common seal of the company is affixed to a document, with all the formalities, and under all the circumstances which would make the instrument valid if it were not *ultra vires*, its being *ultra vires* is wholly immaterial. [JERVIS, C. J., referred to *Bosanquet v. Shortridge*, 4 Exch., 699, where a shareholder in a joint-stock bank, who had ceased in fact to be a shareholder, but had not in retiring observed the formalities prescribed by the deed of settlement, was held to continue liable for the debts of the copartnership.] There the party had entered into a contract by which he became a partner in the concern, and from that contract he could only release himself by observing the formalities which he himself had agreed to observe—the condition upon which alone he was to cease to be a partner had never happened. [JERVIS, C. J.—The defendant was bound to know the contents of a deed to which he was a party. Were not the plaintiffs here bound to know the contents of the acts of Parliament?]

Suppose this were not the case of a public act? [JERVIS, C. J.—Why suppose that which is untrue?] Suppose the case of a company existing under a deed of settlement which requires the observation of certain preliminaries before the common seal of the company can be affixed to any instrument, would the non-observance of one of those preliminaries afford a defense on *non est factum?* If not, does it make any difference that the regulations are contained in an act of Parliament? In both cases the question is the same: had the directors authority to do the act? [MAULE, J.—There is a considerable difference between the preliminaries or conditions upon which the directors shall be authorized to contract and the mode of procedure in contracting. Suppose the act provides that money shall not be borrowed, except for certain specific purposes; and, further, that no deed shall be binding upon the company unless the common seal be affixed thereto in the presence of three directors. I can understand that it might be reasonable to allow the company to say that this latter condition had not been complied with, inasmuch as, it being a formality required by an act of Parliament, the other party

was bound to see that it had been duly observed; but that is a very different thing from requiring him to see to the application of the money.] Assuming this indenture to have been executed in perfect compliance with all the formalities prescribed by the statute, is it competent to the defendants to say, this is not our deed, because we never authorized the directors to make the contract which they have assumed to enter into.

Mr. Baron ROLFE, in delivering the judgment of the court, in the case of *The Mayor, etc., of Ludlow v. Charlton*, 6 M. & W., 814, 823, makes some remarks which well deserve attention. He says: "Before dismissing this case we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know that by such an act *the body will be bound.* But, in other cases, *the seal is the only authentic evidence of what the corporation has done or agreed to do.* The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity of a seal as a relic of ignorant times. It is no such thing; either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent to the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come

within the exceptions to which we have adverted, might be productive of great inconvenience."

In Roll. Abr. *Faits* (K.), it is said: "The deed of a corporation does not require delivery; but the affixing of a common seal gives perfection to it."

And, in Com. Dig. *Franchises* (F. 11), it is said: "An act by the major part corporately assembled, is the act of the whole corporation, if assembled in a convenient place, though not in the chapter-house."

Where there is no particular restriction as to the mode of affixing of the common seal, and authority is given to certain persons to affix it, the contract being sealed, and being a contract in itself not illegal, the company cannot be allowed to say that it is not their deed, because certain of the shareholders were not assenting parties to the contract.

If that be a thing to be complained of at all, it can only be in a court of equity, charging the directors with a breach of trust. There is nothing in any of the acts of Parliament for the regulation of The Eastern Counties Railway Company or in the plaintiffs' acts, which prohibits or restrains the one from taking or the other from granting a lease of their lines of railway. [MAULE, J.—It may be that the defendants, in taking this lease, may be usurping a larger franchise than their acts of Parliament warrant; they may be encroaching, and yet it may not be competent to them to allege their own encroachment. If the directors make contracts which are in breach of their engagements with their own shareholders, they do an illegal thing; but it does not therefore follow that such contracts are void as against strangers, without notice.] Here is a contract under the common seal of the company: how can the court, upon these pleadings, see that it is a contract which the defendants could not legally enter into? [MAULE, J.—The company being incorporated for a particular purpose, and for a particular purpose only, can we upon this declaration see that the contract was one which they could legally enter into? JERVIS, C. J.—It is not within the purpose for which the company was incorporated, it is no contract at all.] How does it appear that this contract is not ancillary to the very purpose for which the defendants were incorporated? In

Pallister v. The Mayor, etc., of Gravesend, 19 Law Journal, N. S., C. P., 358, it was held that a bond given after the 5 & 6 W. 4, c. 76, and before the 6 & 7 W. 4, c. 104, and the 7 W. 4, and 1 Vict., c. 78, by a municipal corporation for money borrowed, is good at law, although under the 92d section of the first act it could not be enforced against the borough fund. [MAULE, J.—The defendants' act of incorporation, 6 & 7 W. 4, c. cvi., does not first incorporate them, and then restrict them as to what it shall be lawful for them to do; but it in § 1, enacts that certain persons who are named, "shall be and are hereby united into a company for making and maintaining the said railway and other works by this act authorized, and for the other purposes herein declared, according to the provisions and regulations hereinafter mentioned, and for that purpose," putting it in the very *viscera* of the clause, "shall be one body corporate, by the name and style of the Eastern Counties Railway Company." But it may be, that, supposing a company to take lease of a chapel or a theater, we could not, without the aid of an express averment to that effect, know that it was not for the purposes of the railway.] If this is a plea of illegality, it ought to have so pleaded in terms; illegality is not to be assumed. *Lewis v. Davidson*, 4 M. & W. 654. At all events, that part of the contract by which the defendants bind themselves to pay the expenses incurred by the plaintiffs in promoting the four bills mentioned in the introductory part of the declaration, is not illegal; nor can it be affected by the illegality of the rest of the contract. *Price v. Green*, 16 M. & W., 346.

Sir *Fitzroy Kelly* (with whom were *Crowder* and *Bovill*), *contra.*—The deed upon which this action is founded, is entered into for a purpose that is illegal and in express violation of the terms and provisions of the act of Parliament under which the defendants were incorporated. The Eastern Counties Railway Company is incorporated for the purpose of making a railway from London to Norwich and Yarmouth, and for that purpose only. The three other companies mentioned on this record are also incorporated under several acts of Parliament, for the purpose of making and maintaining

their several railways—one from Lynn to Dereham, another from Lynn to Ely, and the third from Ely to Huntingdon.

These three last mentioned companies were by a subsequent act incorporated into one company, under the name of the East Anglian Railways Company. Before the act by which they were thus consolidated and united the Lynn and Ely Railway Company, the Ely and Huntingdon Railway Company, and the Lynn and Dereham Railway Company, entered into the contract in question with the defendants. By that contract the defendants, who are incorporated for the sole purpose of making and maintaining a railway from London to Norwich and Yarmouth, having no power, by act of Parliament, or otherwise, to exercise any functions whatever in relation to any other railway, undertook to accept and the other three companies undertook to grant a lease for 999 years of their united railways. The agreement further stipulates that Parliament shall be applied to, to give effect to the contract, and to enable the one company to grant and the other to take the proposed lease; and then came the further stipulations, which are incidental to the main stipulation; viz., the grant of the lease as to the promoting the bills in Parliament for certain proposed advantages to the three companies, and providing for the payment of the costs of obtaining acts of Parliament. Two of these bills, viz., "A bill for making deviation in the line of the Lynn and Ely Railway Company," and "A bill to enable the Lynn and Ely Railway Company to make a navigation from Lynn to Wormegay," passed. One, viz., "A bill to enable The Lynn and Ely Railway Company to extend their railway to Bury St. Edmunds," was thrown out, and the other, viz., "A bill to enable The Lynn and Ely Railway Company to extend their railway to Spaulding and Holbeach," was abandoned at the request of the defendants.

The costs of promoting these bills, amounting to a sum of 21,184*l.*, 16*s.* 2*d.*, the plaintiffs now seek to recover from the defendants. The plea, after setting out the deed upon oyer, state that at the commencement of this action no act of Parliament had been obtained to enable the defendants, or the three companies of which their body was composed, to lease their railways; that they had been unable to obtain any act

of Parliament for that purpose, and that they had abandoned all intention of obtaining one, and then the plea very unnecessarily goes on to allege that certain shareholders of the Eastern Counties Railway Company did not assent to the making or executing of the indenture. The plain and conclusive ground of resistance of this action is that it is founded upon a contract by the Eastern Counties Railway Company to apply the funds raised under the powers and for the purposes of this act of Parliament, to purposes which, upon the face of the contract, manifestly appear to be altogether out of the scope of the act of Parliament upon which alone their authority rests. The Eastern Counties Railway Company's act of incorporation, 6 & 7 W. 4, c. cvi., which is a public act, prescribes the only description of contracts which the company can enter into, and the mode of expenditure of the funds raised under it; the plaintiffs, therefore, have entered into a contract which they knew to be illegal. The company are incorporated for making and maintaining a railway from London to Norwich and Yarmouth, and for that purpose only. By § 3, the company are empowered "to raise amongst themselves any sum of money for making and maintaining said railway and other works by this act authorized, not exceeding in the whole 1,600,000*l.* The fifth section prescribes the manner in which the money to be raised under the act shall be laid out; it enacts, "That the money to be raised by the said company by virtue of this act, shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this act, and all other expenses preparatory or relating thereto," and the remainder in, for and toward purchasing lands, and making and maintaining the said railway and other works, and in otherwise carrying the act into execution. [MAULE, J.—That restriction does not apply to profits.] The application of these is provided for by the 171st section, which relates to the making of dividends, much in the same terms as the 122d section of the companies clauses consolidation act, 8 Vict., c. 16. Then, further power is given to the company by the 246th and 247th sections to raise an additional 600,000*l.* by mortgage, if necessary, "for the making,

completing and maintaining of the said railway and other works by this act authorized to be made, and for defraying all necessary charges and expenses relating thereto."

Wherever an act of Parliament provides that the funds to be raised under it shall be applied in a given way, they *must* be applied in that way and in no other way. [MAULE, J.—Particularly when there is a residuary provision.] Now, the plaintiffs by this action seek to enforce the application of 21,184*l.* 16*s.* 2*d.* of the money raised under the authority and for the purposes of this act, for a purpose totally unconnected with that authority and those purposes; viz., for the promotion of four several bills in Parliament, brought in by another railway company, and for their sole benefit. [MAULE, J.—How does that appear on this record? We have not the terms of the bill before us.] If those bills had been solicited by the defendants themselves, it would still be a misapplication of the funds raised under their act. But it is not necessary to resort to that argument, for this is a contract by one company to indemnify three other companies against the expenses to be incurred in soliciting bills for the exclusive benefit of the latter, for obtaining extensions and improvements of their respective lines.

The court will take notice that bills having reference to the improvement of railways from Lynn to Dereham, from Lynn to Ely, and from Ely to Huntingdon, cannot be for the benefit of the Eastern Counties Railway Company. [JERVIS, C. J.—How can we assume that? The bill in question might have contained clauses beneficial to the Eastern Counties Railway Company, with reference to the powers and provisions of their act. The Eastern Counties Railway Company have a branch to Ely.] It is possible that some contingent and collateral advantages might accrue to the defendants from those bills; but, even if that were so, the contract would still be illegal. [MAULE, J.—We all know that railways sometimes take directions which, having regard to our geographical knowledge only, we would consider very unlikely, in consequence of what are called "engineering difficulties."] It is not alleged that the bills were brought in at the request of the defendants, or that either of

them contained any provisions which could enure to their benefit, or that the contract itself was entered into for any purpose connected with the undertaking already authorized by the Eastern Counties Railway act. But it *does* appear that the inducement to the entering into this contract was the prior and paramount stipulation that these three railways, constituting as they were then about to constitute, and as they do now constitute, the East Anglian Railways, were to be leased to the Eastern Counties Railway for 999 years. It is submitted that a contract of that nature, entered into by a company incorporated for one specific purpose only, and bound to apply its funds for that purpose exclusively, is void. Each shareholder has a right to repose in peace upon the purposes mentioned in the act of Parliament, upon the faith and confidence of which he has invested his money; the directors have no right to impose on him a speculation which is *de hors* the purposes mentioned in the act.

In *Broughton v. The Manchester and Salford Water Works Company*, 3 B. & Ald., 1 (E. C. L. R., Vol. 5), the defendants, a company not established for trading purposes, being sued on a bill of exchange, defended themselves on the ground that it was not competent to them to accept a bill of exchange, that being in contravention of the acts relating to the Bank of England; and this was held to be a good defense. And HOLROYD, J., said: "I take it to be clear, that where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, then, if the violation of the law does not appear on the face of the instrument, and the party taking it is ignorant that it is made in contravention of the statute, it is an available security in the hands of such person. I think, therefore, that, as the statute here does not expressly avoid the security, the bill of exchange, under the circumstances stated in *Wigan v. Fowler*, 1 Stark. N. P. C., 459 (E. C. L. R., Vol. 2), would not be void in the hands of an innocent holder. But here the defendants are made a corporation by a public act of Parliament, and every person is bound to take notice of that act; and when, therefore, a holder of a bill, though a *bona fide* indorsee takes the defendant's acceptance, he must know that they are a body corporate; and he,

therefore, receives it knowing it to be the acceptance of a corporation prohibited from owing money on such a bill; he is not, therefore, an innocent indorsee, because he takes a bill which he knows to be prohibited by statute; and that distinguishes the case from the case of *Wigan v. Fowler*."

That is the ground upon which the cases, one and all, have proceeded. We may assume, therefore, that where a statute makes a contract illegal it is notice to all the world, and all are bound by the illegality of the transaction. It is idle to say that the shareholders in such a case may have relief in equity.

It is only by treating the contract as illegal and void, and incapable of being enforced, that the shareholders, or the public, can be protected from excesses in the exercise of their powers by the directors. One of the earliest cases in equity upon this subject was that of *Colman v. The Eastern Counties Railway Company*, 10 Beavan, 1, where the directors of the company, who are the defendants in this action, for the purpose of encouraging the traffic on their railway, proposed to guaranty certain profits and secure the capital of an intended steam packet company, who were to run steam vessels from the port of Harwich, in connection with the railway; and it was held that such a transaction was not within the scope of their authority, and they were restrained from carrying the bargain into effect. Lord LANGDALE, M. R., lays down the rule in a manner that is quite decisive of the present case. "I think it right to observe," he says, "that companies of this kind, possessing most extensive powers, have so recently been introduced into this country, that neither the legislature nor the courts of justice have been able to understand all the different lights in which their transactions ought properly to be viewed. We must adhere, however, to ancient general and settled principles, so far as they can be applied to great combinations and companies of this kind. Joint stock companies have funds so extremely large, and exercise powers so extensive and so materially affecting the rights and interests of other persons, and the rights which the public or the subjects of her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a railway company in the light of a common partnership, and as

subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise, of interference, not only with the public, but with the private rights of all individuals in the realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; I am clearly of opinion that the powers which are given by an act of Parliament like that now in question extend no further than is expressly stated in the act, or is necessarily or properly required for carrying into effect the undertaking and works which the act has expressly sanctioned. I must, in the absence of any legal decision, say that I consider that the acquiescence of the shareholders in such transactions affords no grounds whatever for the presumption of their legality. I am far from saying that that which is here proposed to be done might not be profitable to this company, or that it might not be a public advantage. I am far from expressing an opinion that the establishment of a steam packet company at Harwich, communicating with this railway, might not only be of public but of national importance, or that it might not be proper to give this company authority to do that which they are now attempting to do, as it seems to me without authority. I mean to express no opinion as to this. What they are doing is this: Under the powers of this act of Parliament, enabling them to do what is required for the construction, maintenance, and proper and convenient use of this railway they are proposed to pledge the funds of this company to support the proposed Harwich Steam Packet Company to the extent of 150,000*l.*, or even 300,000*l.* It is not proposed that the railway company should directly, and by their own directors, engage in the steam packet company, and carry on that trade; but only that they should impose on the railway company the whole risk and liability, not only of paying interest at 5*l.* per cent, but,

if the transaction should turn out an unprofitable one, of making good to every shareholder the full amount which he has paid. Is there anything in this act of Parliament sanctioning such a course of proceedings? Do the powers to construct, maintain and regulate the traffic, and do all that is necessary for the purpose of carrying on and working a railroad, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and, by being itself profitable, add to the profits of the railway company? Surely there is nothing in the powers given by this act of Parliament which can authorize that."

It is clear, therefore, that, in the opinion of that very learned person, no prospect of advantage, however proximate, or even certain, to the present defendants, from the obtaining the proposed acts of Parliament by the other three companies, would justify them in imposing upon their shareholders the liability which is sought by this contract to be imposed upon them. His honor further observes, "I must say, that, in my opinion, to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of Parliament, they have not a right to do." A company established by act of Parliament with limited powers, and for limited purposes, cannot exceed those powers and apply the funds of the company to any purposes other than those specified in the act. In *Salomons v. Laing*, 12 Beavan, 339, a railway company became lawfully possessed of shares in another independent railway company; and it was held, that, having no authority to do so by their act of Parliament, they could not legally, as against one dissentient shareholder, increase the number of their shares, or apply their funds for the support of the second company. Lord LANGDALE there says: "A railway company incorporated by act of Parliament, is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purpose whatever. Any application of or dealing with the capital, or any part of the capital, or any funds or money of the company, which comes under the control or management of the di-

rectors, or governing body of the company, in any manner not distinctly authorized by the act, is in my opinion an illegal application or dealing." [MAULE, J.—Was the point made in any of these cases, that the contract was void in law?] It was, in *Pagshaw v. The Eastern Union Railway Company*, 2 M'N. & G., 389, a railway company having power, under separate acts of Parliament, to make and purchase certain branch railways, in connection with their main line, were for those purposes respectively authorized to raise the requisite capital, by the creation of new stock. Having issued scrip certificates accordingly, but being about to apply the money subscribed in respect thereof to the prosecution of works on their original line, a holder of such scrip filed a bill to restrain them; and Lord POTTENHAM held that those who subscribed for the purposes specified by the acts, had a right to have their money applied to such purposes exclusively. In *Beman v. Rufford*, 15 Jurist, 914, the directors having entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained at the suit of some of the shareholders from doing so until the validity of the contract had been decided at law. Lord CRANWORTH expressed a strong opinion that the contract was illegal, and said: "I am clearly of opinion, on all authorities, and all principle, that it is the province of this court to prevent such an illegal contract from being carried into effect, because, on the principle that has been so often laid down this court will not tolerate that parties having the enormous powers which these railway companies have obtained, shall lay out one farthing of the funds out of the way in which it was provided by the legislature that they should be applied." [MAULE, J.—All these cases arose upon the application of dissentient shareholders. Where an agreement has been procured by fraud, the party defrauded may at his election treat it as void, but he must make his election within a reasonable time. *Campbell v. Fleming*, 1 Ad. & E., 40 (E. C. L. R., Vol. 28); 3 N. & M., 834 (E. C. L. R., Vol. 28.) The party guilty of the fraud, however, has no such election.] Here the contract is not voidable at the election of either party; it is absolutely and incurably void. A contract may be illegal, as being in fraud of a particular individual; in that

case, it is he only who can impeach it. But a contract may also be illegal because it is in contravention of an act of Parliament; and, if such be the character of the illegality, the contract is absolutely void, without reference to the election of any party. That is the case here. [MAULE, J.—If you could show a case of a bill filed for a specific performance of such a contract as this, it would be much more to the purpose.] The validity of such a contract as this came under discussion before Vice Chancellor TURNER, in a case of *The Great Northern Railway Company v. The Eastern Counties Railway Company*. The circumstances were these: The East Anglian Railways Company not having obtained, and probably not desiring to obtain, any act of Parliament authorizing them to perform this contract by leasing their lines to the defendants, entered into an agreement with The Great Northern Railway Company for leasing or in some way transferring them to that company; and an application was made to the Vice Chancellor by the Great Northern Railway Company, for an injunction to restrain the Eastern Counties Railway Company from doing certain acts which they were charged with doing for the purpose of preventing that contract from being fully carried into effect; viz., obstructing the crossing of their line. And the injunction was refused, on the ground that the contract was illegal and void, as being a contract for the doing of a thing which was not authorized by the acts of incorporation of The East Anglian Railways Company, or of the other companies of which that company was composed. It is contrary to public policy to permit a railway company to deal with the railway, or with the funds of the company, otherwise than in strict accordance with their acts of Parliament. [MAULE, J.—The public has an obvious interest in the due application of the funds, inasmuch as their misapplication, by crippling the resources of the company, tends to prevent a reduction of fares.] In the case of *Shrewsbury and Birmingham Railway Company v. The North Western Railway Company*, now pending in the Court of Queen's Bench, this point is raised upon a demurrer to the declaration. In *Munt v. The Shrewsbury and Chester Railway Company*, 20 Law Journal, N. S., Chan., 169, the Shrewsbury and Chester Railway

Company were, by various acts of Parliament, empowered to make several railways, and also to build wharfs and warehouses, for the purposes of the traffic of the company on the banks of the Dee, the conservency of which was vested in other persons. The company brought a bill into Parliament to preserve and improve the navigation of the river, though it had no power to employ any of its capital for that purpose; and, upon a bill filed by one shareholder, it was held that the company could not legally employ any of their capital in payment of the expenses of preparing, prosecuting, or promoting the bill in Parliament, or for any other purpose not authorized by their acts of incorporation; and an injunction was granted to restrain them from so doing. There the proposed bill was obviously most closely connected with the interests of the company, and yet the application of any of their funds to the promotion of it was held to be *ultra vires*, though by no means so palpable a misapplication of the funds as that contemplated by this contract. The Master of the Rolls (Lord LANGDALE), in the course of a very long and a very able judgment, says: "I do not think that this question has even been before the House of Lords; but, so far as the power of the Court of Chancery extends, it has unalterably decided that companies possessed of funds for objects which are distinctly defined by act of Parliament, cannot be allowed to apply them to any other purpose whatever, however beneficial or advantageous it may appear either to the company or to individual members of the company." In all these cases, the sole question has been whether or not the contract was legal. With regard to the cases cited on the part of the plaintiffs, they will all, upon examination, be found, if applicable at all, to be in reality authorities the other way. *Clarke v. The Imperial Gas Light Company*, 4 B. & Ad., 315 (E. C. L. R., Vol. 24); 1 N. & M., 206 (E. C. L. R., Vol. 28), merely decided that the court would presume nothing in favor of an objection on the part of the directors that the formalities prescribed by the act of Parliament in affixing the company's seal to an instrument, had not been duly complied with. In *Hill v. The Manchester and Salford Water Works Company*, 2 B. & Ad., 544 (E. C. L. R., Vol. 22), it was held that the company could not, under *non est*

factum, show that a bond executed by them was invalidated by collateral matter, but they might show that it was void because executed contrary to the provisions of the act of Parliament. Here, the defendants do not seek to avoid the contract by any collateral matter; but they say it is illegal and void, because contrary to the provisions of the act of Parliament. In the next case between the same parties 5 B. & Ad., 866 (E. C. L. R., Vol. 27); 2 N. & M., 573 (E. C. L. R., Vol. 28), LITTLEDALE, J., says: "These pleas might have been an answer to the plaintiff's action, if they had shown that the bonds were given in consideration of some act which was immoral, or contrary to act of Parliament or public policy." That is the precise defense here? this contract is contrary to act of Parliament and public policy. In the notes of the *King v. Kilderly*, 1 Wms. Saund., 309*c*, numerous cases are referred to in support of the position that, "when the provisions of an act of Parliament have been infringed, no contract can be enforced, arising out of the transaction."

The clear ground upon which it is submitted that this action is not maintainable is, that it is founded upon a contract by which the defendants undertook to pay certain expenses which by law they had no power to undertake to pay, and to the payment of which they had no power by law to apply any of the funds which might come into their hands under the act of Parliament, a contract which it was impossible for them to make or to perform without exceeding the powers and violating the provisions of their act of Parliament. The stipulation to pay the costs of soliciting the bills, the non-payment of which is the breach here assigned, is entirely dependent and based upon the agreement to lease. The whole is void.

Bramwell, in reply: The first question is, whether, independently of any question as to its legality as between the company and the public, this was a contract which the parties had legal capacity to enter into. The act of Parliament first constitutes the company, and then gives them certain rights and powers and imposes upon them certain duties in reference to the public. It is difficult to say that a corporation cannot bind themselves by a contract, which is *ultra* the scope of their

authority, when it has been held that they may be indicted for a misfeasance, in obstructing an old road without first substituting a new one. *The Queen v. The Great North of England Railway Company*, 9 Q. B., 315 (E. C. L. R., Vol. 58). [MAULE, J.—Whether a corporation may, after a thing has been done under the authority of their common seal, defend themselves on the ground that the thing done was one which they had no legal authority to do, is a very different question from whether they can enforce an executory contract which has been entered into without legal authority.] The act of creating them a corporation and giving them a common seal, gives them all the powers which are legally incident to a corporation. And, when a corporation intrusts a particular number of its body with a seal, it is competent for the parties so intrusted to bind the corporation by affixing the seal to any contract which is not contrary to law, or expressly prohibited by any act of Parliament. And there is nothing upon this record to show that this is an illegal contract. [MAULE, J.—The real question is, whether the company, being created a corporate body for a specific purpose, have any power to contract beyond the scope of that limited and special authority.] The question here is not whether a court of equity would restrain the parties, at the instance of a shareholder, from entering into or acting upon such a contract as this; but, whether it is *per se* illegal. Now, the 208th section of the 6 & 7 W. 4, c. cvi., enables the Eastern Counties Railway Company "from time to time to make and enter into any contract or agreement with any other railway company (and which contract or agreement all other railway companies are hereby empowered to make and enter into), either for the division or apportionment of the rates, tolls, and duties, or for the passage over or along the railway by this act authorized to be made, of any engines, etc., of or belonging to any other railway company, or which shall pass over or along any other line of railway, or for the passage over or along any other line of railway, of any engines, etc., which shall belong to the said Eastern Counties Railway Company, or which shall pass over or along their line of railway, upon the payment of such rates, tolls or duties, and under such conditions and restrictions as may be mutually agreed upon; and also to

make or enter into any other contract with any other railway company that may be deemed advisable; and every such contract may contain such covenants, clauses, provisions, conditions and agreements as the contracting parties may think advisable and mutually agree upon." [MAULE, J.—The preamble to that section shows what is meant by it; it has reference solely to the convenience of running the carriages of one company upon a portion of the line of another railway communicating with it. The very enactment shows that the legislature thought an express provision necessary to enable the companies to enter into even such contracts as that.] It might be necessary, to justify the directors, as against dissentient shareholders. [MAULE, J.—If, then, section 208 is a mere enactment regulating the exercise of the powers of the company, you must resort to the incorporation to see what is the extent of their powers.] It is impossible to see that the purposes for which this contract was entered into are so foreign to the purposes for which the Eastern Counties Railway Company was incorporated, as to make the contract illegal.

JERVIS, C. J., now delivered the judgment of the court:

This is an action of covenant. The declaration states that before the contract was made there were four railway companies, each incorporated by a separate act of Parliament, The Lynn and Ely Railway Company, The Ely and Huntingdon Railway Company, The Lynn and Dereham Railway Company, and the defendants, The Eastern Counties Railway Company; that the Lynn and Ely Railway Company had introduced into Parliament, upon their own petition, four bills for purposes connected with their railway; that the three first named companies had agreed to amalgamate and form one company, under the name and style of the East Anglian Railways Company; and that a bill was then pending in Parliament to give effect to such agreement. The declaration then states that the defendants, by an indenture under their common seal, between themselves and the plaintiffs (comprehending the three first named companies, since amalgamated by act of Parliament, covenanted with the plaintiffs, amongst other things) to take a lease of their railways upon certain terms mentioned

in the indenture, and to find the capital necessary for the construction of the extension's branches and works authorized to be constructed by the bills then pending in Parliament, and to pay the costs of preparing and promoting such bills, whether the same should pass into a law or not. The declaration further states that the bills were proceeded with, and two were passed, and that the cost of the bills, amounting to a large sum, had not been paid by the defendants to the plaintiffs.

The defendants set out indenture upon oyer, and pleaded that the plaintiffs had no authority to grant leases of their railways to the defendants; that they had been unable to obtain acts of Parliament for that purpose; that they had abandoned all intention of so doing; and that several shareholders of the defendant's company (naming them) had not assented to the making or executing the indenture, or the agreement therein contained.

The plaintiff demurred generally to this plea, and the question for the opinion of the court is, whether, upon this record, the plaintiffs can maintain their action. We are of the opinion that they cannot, and that the defendants are entitled to judgment.

The defendants are incorporated by the statute 6 & 7 W. 4, c. cvi., the first section of which enacts that certain persons shall be united into a company for making and maintaining the railway mentioned in that section, and other works by that act authorized, and for other purposes in that act declared, and for that purpose shall be one body corporate by the name and style of "The Eastern Counties Railway Company," and have perpetual succession and a common seal.

The third section empowers the company to raise a sum of money for making and maintaining the said railway and other works authorized by the act; and the 5th section directs the money so raised to be expended in and towards making and maintaining said railway and other works, and in otherwise carrying the act into execution. The money raised on mortgage is to be applied in the same way, § 246; and the profits of the company, after defraying the expense of making, maintaining and working the said railway, are to be accounted for

and divided amongst the proprietors of the undertaking. §§ 170, 171.

This act is a public act, accessible to all, and supposed to be known to all, and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be.

It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their acts; but it is said they may embark in other undertakings, however various, provided the object of the directors be to increase the profit of their own railway.

This, in truth, is the same proposition in another form; for, if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object, or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway, and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority.

Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed, and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which, at some remote period, may prove highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously im-

paired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the legislature.

The cases in equity which have been cited, proceeded upon this view of the subject, and were decided, not because the particular act restrained by injunction was a breach of trust, but because it was not in the scope of the directors' authority; was not justified by the statute, and was, therefore, illegal.

In *Coleman v. The Eastern Counties Railway Company*, 10 Beavan, 15, the Master of the Rolls (Lord LANGDALE) says: "It has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts, but it has been contended that they have a right to pledge, without limit, the funds of the company in the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit of the shareholders. There is, however, no authority for anything of that kind." So in *Salomons v. Laing*, 12 Beavan, 352, he says: "A railway company incorporated by act of Parliament, is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever.

The same principle was adopted by the Lord Chancellor in the case of *Bagshaw v. The Eastern Union Railway Company* 2 M'Naght. & G., 389, by Lord CRANWORTH in *Beman v. Rufford*, as reported in Jurist for this year (15 Jurist, 914), as we are told by Vice Chancellor Turner in the case of *The Great Northern Railway Company v. The Eastern Counties Railway Company.*

In the last two cases the learned judges treated questions similar to the present as purely legal questions, and, therefore, directed cases to be stated for the opinion of a court of law, but at this same time expressed their opinion that the contracts were illegal, and, therefore, void.

If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentiate shareholders; for, if the company is a corporation only for a

limited purpose and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds.

But it is said that it does not sufficiently appear upon this record that the bills in Parliament, and for which the defendants covenanted to pay the costs, were not connected with the defendant's railway. If railway companies could embark in undertakings collateral to their main line, merely because the main line might in the result be benefited, there would be much in this objection; but upon the view which we have above expressed, the objection cannnot prevail.

We know that each of the four litigant companies has a separate act of Parliament; we know that the statute incorporating the defendants' company gives nó authority respecting the bills promoted by the plaintiffs; and we are, therefore, bound to say that any contract relating to such bill is not justified by the act of Parliament; is not within the scope authorized by the company, as a corporation, and is, therefore, void.

For these reasons we are of opinion that there ought to be judgment for the defendants.

JUDGMENT FOR THE DEFENDANTS.

LEASE OF ALL THE PROPERTY AND FRANCHISES OF A RAILROAD COMPANY, ULTRA VIRES.

SECOND SELECTED CASE.

THOMAS v. RAILROAD COMPANY.*

1. The powers of a corporation organized under a legislative charter are only such as the statute confers; and the enumeration of them implies the exclusion of all others.
2. A lease by a railroad company of all its road, rolling-stock, and franchises, for which no authority is given in its charter is *ultra vires* and void.

* Reported in 101 U. S., 71 (1879).

3. The ordinary clause in the charter authorizing such a company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads, confers no authority to lease its road and franchises.

4. The franchises and powers of such a company are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration for granting them. A contract by which the company renders itself incapable of performing its duties to the public, or attempts to absolve itself from its obligations without the consent of the State, violates its charter and is forbidden by public policy. It is, therefore, void.

5. The fact that the legislature, after such a lease was made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity.

6. Where a lease of this kind for twenty years was made, and the lessors resumed possession at the end of five years, and the accounts for that period were adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle that executed contracts originally *ultra vires* shall stand good for the protection of rights acquired under a completed transaction.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Covenant.—This was an action of covenant by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove the following facts: On the 8th day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the legislature of New Jersey, March 9, 1859, entered into an agreement with them, whereby it was stipulated that the company should, and did thereby, lease its road, buildings and rolling-stock to them for twenty years, from the first of August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiff so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by, and

justly and equitably due to them, by reason of such termination thereof; that in the event of a difference of opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be final, conclusive and binding upon the parties.

On the 10th of April, 1867, the legislature of New Jersey passed an act entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company.'" It was therein enacted that it should be unlawful for the directors, lessees or agents of said railroad to charge more than the sums therein named for passengers and freight respectively. The plaintiffs claim that at the date of the passage of this act it was well known that they were acting under the said agreement of 8th October, 1863.

On the 12th of October, 1867, articles of agreement were entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

On the 18th of March, 1868, the legislature of New Jersey passed an act whereby it was enacted that, upon the fulfillment of certain preliminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, "subject to all the debts, liabilities, and obligations of both of said companies." The conditions required by that act were duly fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the 1st of April, 1868.

On April 13, 1868, and again on May 22 of the same year, notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. The latter company refused to comply with the terms of either notice; but subsequently, on

the 21st of December, 1868, an agreement of submission was entered into between the plaintiffs and the latter company, whereby H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties. These arbitrators disagreeing, called in a third, who joined with said Baird in an award, by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof to and by the plaintiffs, was adjudged to be the sum of $159,437.07, and the West Jersey Railroad Company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted and sued out this writ.

They assign for error that the court below erred:

1. In excluding from the consideration of the jury the offered evidence of the said agreement between the Millville and Glassboro Railroad Company and the plaintiffs; of the acts of the Assembly of New Jersey, one an act to incorporate the Millville and Glassboro Railroad Company, approved the 9th of March, 1859, and another an act entitled "A supplement to the act entitled 'An Act to incorporate the Millville and Glassboro Railroad Company,' passed the tenth day of April, 1867," and the acts referred to therein; of the fact that it was well known at the date of the last named act that the plaintiffs were lessees acting under the said contract and agreement; and of all the other acts of the legislature of the State of New Jersey relating to the West Jersey Railroad Company, and to the Millville and Glassboro Railroad Company.

2. In directing the jury that their verdict must be for the defendant.

3. In entering judgment upon the verdict for the defendant.

Mr. George W. Biddle and *Mr. A. Sydney Biddle*, for the plaintiffs in error.

I. The contract of 8th October, 1863, was *ultra vires* of the Millville and Glassboro Railroad Company, because authorized by the act of incorporation.

First. It was expressly authorized by the act of incorporation, the thirteenth section of which declares "that it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandize, freight, or passengers, and to enforce the fulfillment of such contracts."

A supplement to that act, approved April 10, 1867, sustains this position, for it enacts "that it shall be unlawful for the directors, *lessees* or *agents* of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one-half of the above rates be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: *Provided*, that nothing contained in this act shall deprive the said railroad company, *or its lessees*, of the benefits of the provisions of an act entitled 'An act relative to freights and fares on railways in the State,' approved March 4, 1858, and applicable to all other railroads in this State."

Second. The contract in question was impliedly authorized by the act of incorporation. It was, in fact, a mere appointment of agents or employés to run the road, making it for their advantage to economize and advance the interest of the road by paying them upon a sliding scale. Although the words "lease" and "lessees" are employed, its terms show that the plaintiffs were in no respect lessees in a legal sense. It was confined to twenty years. The company could put an end to it and re-take possession upon three months' notice. The contract would terminate by the death of either of the so-called lessees, or by their omission to make the regular pay-

ments. They were required forthwith to discharge from their employment any person employed by them whom the company, through their directors, should wish removed. The plaintiffs were to pay to the company one-half the gross amount received, and to secure their covenant to keep their rolling-stock, etc., in good repair, by depositing yearly a sum of $10,000 with a trustee, who acted as agent for the company. This case essentially differs from those in which it has been held that a contract whereby a railroad company engages to employ the corporate funds in a manner not authorized by the charter, is void, and that its execution will, upon the application of a shareholder, be restrained by a court of chancery, and from those in which such a contract has by a common law court been declared to be impliedly forbidden by the legislature, and therefore void as against public policy.

The fund was to be appropriated under the direction of the company for repairing and replacing the track, road-bed and rolling-stock. Any dispute as to what were current repairs (to which no portion of this fund was to be applied), and what were the repairs to perpetuate the road and rolling-stock, was to be settled by an agent of the company. This fund was to be applied by the trustee upon the order of, and only to the purposes designated by, the Millville Company.

No definition of a lease can be framed which will comprehend such an agreement. It was, in truth, an appointment of three agents to take charge of a small road a few miles long.

Third. The objection of *ultra vires* cannot be maintained in this case. The funds of the corporation were not engaged outside of the scope of the object of its charter; and although it devolved some of its administrative duties to others, the supervision of the directors was not withdrawn, and the rights of the shareholders were carefully secured. *Robbins v. Embry*, 1 Smed. & M. (Miss.), Ch. 268, 269; *Llanelly Railway & Dock Co. v. London & Northwestern Railway Co.*, Law Rep., 8 Ch., 942.

An instrument providing that a railroad shall be run, not directly by the corporation, but by agents appointed by it, has never been declared invalid. *Galveston Railroad v.*

Cowdrey, 11 Wall., 459. It is not a valid objection that the plaintiffs should be primarily liable to the public. *Langley v. Boston & Maine Railroad*, 10 Gray (Mass.), 103. The corporation remained bound. It has never attempted to evade the duties nor escape from the responsibilities imposed by its charter; and it could not successfully do so. *York & Maryland Line Railroad Co. v. Winans*, 7 How., 30; *Bissell v. Michigan & Northern Indiana Railroad Company*, 22 N. Y., 258.

II. The contract was authorized, inasmuch as it was neither directly nor impliedly forbidden; was germaine to the object for which the company was formed, and would have been valid at common law if made by a corporation created by charter.

A corporate body may (at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter.

The real position being in such cases, Has the charter prohibited the contract sought to be enforced; if it has, has the prohibited portion been completely executed; if it has not, have the partners, the shareholders in the corporation, ratified the act which their agents, the directors, were, as against them, unauthorized to perform? *Taylor v. Chichester & Midhurst Railway Co.*, Law Rep., 2 Ex., 356; *The Mayor of Norwich v. The Norfolk Railway Co.*, 4 El. & Bl., 397; *The East Anglian Railways Co. v. The Eastern Counties Railway Co.*, 11 C. B., 775; *Chambers v. Manchester & Milford Railway Co.*, 5 B. & S., 588; *South Wales Railway Co. v. Redmond*, 10 C. B., N. S., 675; *Bateman v. Mayor, etc., of Ashton-under-Lyne*, 3 H. & N., 323; *Shrewsbury & Birmingham Railway Co. v. The Northwestern Railway Co.*, 6 H. of L., 113, 136.

The authorities establish the proposition that a contract not forbidden may be enforced, where the shareholders have assented. In this case there was a prior unanimous assent and a subsequent unanimous ratification, and the illegal part, if any, of the contract, has been completely executed.

III. The defense of *ultra vires* is inadmissible to an action against a corporation upon its contracts duly made, where (if not wholly executed) all the shareholders have acquiesced in its preformance, or where the contract has been wholly performed by the other party without objection on the part of the corporation, or any of the shareholders. *Graham v. Birkenhead Railroad Co.*, 2 Mac. & G., 146; *Phosphate of Lime Co. v. Green*, Law Rep, 7 C. P., 43, 62, 63; *The Erie Railway Co. v. The Delaware, Lackawanna & Western* and *The Morris & Essex Railroad Companies*, 21 N. J. Eq., 283, 289; *Riche v. The Ashbury Railway Carriage & Iron Co.*, Law Rep., 9 Exch., 244.

Where the transaction is complete, and nothing remains to be done by the party seeking relief, the plea of *ultra vires* is not available by the corporation in an action brought against it for not preforming its side of the contract. *The Silver Lake Bank v. North*, 4 Johns (N. Y.), Ch. 370, 373; *Gold Mining Co. v. National Bank*, 96 U. S., 640; *National Bank v. Matthews*, 98 Id., 621; *Steamboat Company v. McCutcheon & Collins*, 13 Pa. St., 13; *Oneida Bank v. Ontario Bank*, 21 N. Y., 490, 495; *Bissell v. Michigan Southern & Northern Indiana Railroad Companies*, 22 Id, 258, 272, 273; *Whitney Arms Co. v. Barlow*, 63 Id., 62, 68, 69; *Steam Company v. Weed*, 17 Barb. (N. Y.), 378; *Moss v. Mining Company*, 5 Hill (N. Y.), 137; *Grant v. Henry Clay Coal Co.*, 80 Pa. St., 208, 218; *Oil Creek & Allegheny River Railroad Co. v. Pennsylvania Transportation Co.*, 83 Id., 160; *McCluer v. Manchester & Lawrence Railroad*, 13 Gray (Mass.), 124; *Gifford v. New Jersey Railroad Company*, 2 Stock. (N. J.), 177; *Galveston Railroad v. Cowdrey*, 11 Wall., 459, 476; *Smith v. Sheeley*, 12 Id., 358, 361; *Kelly v. Transportation Company*, 3 Oreg., 189; *Weber v. Agricultural Society*, 44 Iowa, 239; *Showalter v. Pirner*, 55 Mo., 233; *Chambers v. City of St. Louis*, 29 Id., 543; *Land v. Coffman*, 50 Id., 243; *Wade v. Colonization Society*, 7 Smed. & M. (Miss.), 663, 697; *Robbins v. Embry*, *supra*.

IV. If the contract were originally *ultra vires*, it was ratified, and, for the future, authorized by the act of 10th April, 1867. P. L. of New Jersey of 1867, p. 915; Record, 40.

It is a well settled principle of law that statutes, by implication, ratify and legalize former unauthorized proceedings of a corporation, where the unlawful act is mentioned or referred to in them as a proper one; and if the act be a continuing one, it is authorized for the future. *The Ecclesiastical Commissioners for England v. Northeastern Railway Co.*, 4 Ch. Div., 845.

Mr. Samuel Dickson, contra.

Mr. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The ground on which the court held the contract to be void and on which the ruling is supported in argument here, is, that the contract amounted to a lease, by which the railroad, rolling-stock and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

It is denied by the plaintiffs that the contract can be fairly called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side, and a recompense by rent or other consideration on the other." 4 Bac. Abr., 632.

"Anything corporeal or incorporeal, lying in livery or in grant, may be the subject-matter of a lease and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments, are included in the common law rule." Bouv. L. D., *Lease*; 1 Wash., Real Prop., 310.

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad, and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives as rent one-half of all the gross earnings of the road.

The usual provision for a right of re-entry on the failure to perform covenants in addition to the special right to terminate the lease on notice, and the usual covenant for repairs and

proper running of the road, equivalent to good husbandry on a farm, are inserted in the instrument.

The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the franchises of the company is reserved. A solitary exception to this statement, of no value in the actual control of affairs, is found in the sixth clause of the lease, which covenants that the lessees will discharge any one in their service on the request of the corporation, evidenced by a resolution of the board of directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the Circuit Court devolved the duty of proving one of the following propositions:

1. The contract was within the powers granted to the railroad company by the act of the New Jersey legislature under which it was organized.

2. That if this be not established, the lease was afterwards ratified and approved by another act of that legislature.

3. That if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kind of goods, produce,

merchandise, freight, or passengers, and to enforce the fulfillment of such contracts."

This is no more than saying, "you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies.

In *The Ashbury Railway, Carriage and Iron Co. v. Riche*, decided in the House of Lords in 1875 (Law Rep., 7 H. L., 653), the memorandum of association, which, as Lord CAIRNS said, stands under the act of 1862 in place of a legislative charter, thus described the business which the company was authorized to conduct: "The objects for which this company is established are to make, sell, or lend on hire, railway carriages and engines, and all kinds of railway plant, fittings, machinery and rolling-stock; and to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants, timber, coal, metals and other materials, and to buy and sell any such materials on commission or as agents."

This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterwards on its agreement with Riche, the contractor, and the contract was held valid in the Exchequer Chamber by a majority of the judges, on the ground, that while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by the ratification of the shareholders to whom it had been submitted.

The House of Lords reversed this judgment, holding unani-

mously that the contract was beyond the powers conferred by the memorandum above recited, and being beyond the powers of the association, no vote of the shareholders whatever could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the company.

If a memorandum which describes the parties as engaging in furnishing nearly all the materials, machinery and rolling-stock which enter into the construction of a railroad and its equipments, and then empowers them to carry on the business of *mechanical engineers and general contractors*, cannot authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it, and with the lease to part with all its powers to another company or to individuals. We do not think there is anything in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter, a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

This class of subjects has received much consideration of late years in the English courts, and counsel have relied largely on the decisions of those courts. Among the cases cited by both sides is *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 C. B., 775. In that case the Eastern Counties Railway Company had made a contract

in which, among other things, it covenanted to take a lease of several other railroads whose companies have introduced into Parliament a bill for consolidation under the name of East Anglian Railways Company, and to assume the payment of Parliamentary expenses of this act of consolidation.

This covenant was held void, as beyond the power conferred by the charter. "They cannot," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority."

This case, decided in 1851, was afterward cited with approval by the Lord Chancellor, in 1857, in delivering the opinion of the House of Lords, in *Eastern Counties Railway Company v. Hawkes* (5 H. L. Cas., 331), and it is there stated that it was also acted on and recognized in the Exchequer Chamber in *McGregor v. The Deal & Dover Railway Co.*, 22 Law J., N. S., Q. B., 69; 18 Q. B., 618. Both these cases are cited approvingly in the opinion of Lord CAIRNS in *The Ashbury Company*, on appeal in the House of Lords.

This latter case, as decided in the Exchequer Chamber (Law Rep., 9 Exch., 224), is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor CAIRNS, Lords SELBORN, CHELMSFORD, HATHERLY and O'HAGAN, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that when a coporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due preformance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice CAMPBELL, in *The New York & Maryland Line Railroad Co. v. Winans*, 17 How., 30. The corporation in that case was chartered to build and maintain a railroad in Pensylvania by the legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore & Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling-stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has ar-

ranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. *Beman v. Rufford*, 1 Sim., N. S., 550; *Winch v. B. & L. Railroad Co.*, 13 L. & Eq., 506."

And in the case of *Black v. Delaware & Raritan Canal Co.*, 22 N. J., Eq., 130, Chancellor ZABRISKIE, says: "It may be considered as settled that a corporation cannot lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority." P. 399. For this he cites some ten or twelve decided cases in England and in this country.

This brings us to the proposition that the legislature of New Jersey has given her consent by an act which amounts to a ratification of this lease.

The act is entitled, "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company,'" approved April 10, 1867; and its only purpose was to regulate the rates at which freight and passengers should be carried. It reads as follows:

"That it shall be unlawful for the directors, *lessees* or *agents*, of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package weighing less than one hundred pounds; nor shall more than one-half the above rate be charged for carrying any fertilizing materials, either in their own cars, or cars of other companies running over said railroad: *Provided*, that nothing contained in this act shall deprive the said railroad company, *or its lessees*, of the benefits of the provisions of an act entitled, 'An Act relative to freights and fares on railways in the State,' approved March 4, 1858, and applicable to all other railroads in the State."

It may be fairly inferred that the legislature knew at the

time the statute was passed that plaintiffs were running the road, and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

The legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the railroad. The mention of the lessees no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract. It is not by such an incidental use of the word "lessees" in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State.

It remains to consider the suggestion that the contract having been executed, the doctrine or *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully preformed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations, the rule has been well laid down by COMSTOCK, C. J., in *Parish v. Wheeler* (22 N. Y., 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms.

There remains unperformed the covenant to arbitrate with

regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement it was the duty of the company to rescind or abandon it at the earliest moment.

This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was, nevertheless, a rightful act when it was done. Can this performance of a legal duty, a duty both to the stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transactions.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court.

JUDGMENT AFFIRMED.

MR. JUSTICE BRADLEY did not sit in this case.

NOTES

General observations on the doctrine.—The term *ultra vires* signifies the act of a corporation which is beyond the power expressly conferred upon it, and not within the scope of those which are incidentally conferred by its charter; the doctrine being, that, as to such act the corporation may

be restrained, in equity, by injunction, as we shall hereafter see, from doing it; or it may set this up as a defense to a suit on a contract executed by the corporation which is beyond the power of the corporation to enter into, as the foregoing cases illustrate.

This doctrine, which, it may be observed, relates solely to corporations, is of comparative recent origin; the case of *The East Anglian Railways Company v. The Eastern Counties Railway Company*, above copied, being the first reported English case at law where the doctrine was applied; although several American cases were previously reported.

At the time the doctrine was first promulgated, corporations were comparatively few and unimportant; and many of the early principles and doctrines relating to them have since been changed or modified.

The great variety and magnitude of the enterprises in which mankind has been interested within the last half century has greatly multiplied corporate associations, and necessitated greater latitude and freedom of action for them; and this necessity has been recognized and favored by the liberal and comprehensive views of the courts. Our jurisprudence relating to private corporations has been rapidly extended and improved. Embarrassing doctrines have been discarded, and technical legal principles modified to meet the requirements of the age. To avoid the frequent hardships incident to the application of the doctrine of *ultra vires* as a defense to actions on contracts, the courts, by a liberal interpretation of charters, have given greater latitude to the powers of corporations; and acts of corporations that would formerly have been treated as *ultra vires* would now be considered as within the incidental powers conferred by their charters.

The doctrine has been characterized by eminent judges as "technical" and "ungracious," and as "shocking to the moral sense," when interposed as a defense to contracts deliberately entered into and apparently for the benefit of the corporation; and it is manifestly unjust in its application to contracts where the corporation has received and enjoyed the consideration of them.

But various expedients have been devised to relieve parties dealing with corporations from this hardship; such as a liberal construction of the charter, giving thereby authority to act and contract in the premises as one of the incidental powers of the corporation; and by allowing, in some cases, an enforcement of it, where it has been executed by the other party to it, and the corporation has received the full benefit of it; or, by allowing a recovery for the money paid, or the property or other consideration delivered to the corporation, as we shall hereafter see, in some appropriate form of action.

Reasons in support of the doctrine.—The reasons advanced in support of the general doctrine of *ultra vires* may be briefly stated as follows:

1. That as a part of the sovereign authority is by the act of incorporation irrevocably conferred upon the corporation, the privileges conferred by the charter constituting a contract between the sovereign or State and the corporation, the consideration of the grant being the public benefit to be derived, incidentally, from the use of the privileges conferred, the toleration of *ultra vires* acts might lead to dangerous assumptions of power, and

jeopardize sovereignty itself; for, if permitted at all, they might be extended indefinitely.

2. The public are interested in the execution of the enterprises for which corporations are created; and stockholders are presumed to become such, with the expectation that the business of the corporation will be kept within the scope of the powers conferred by the charter; but, if the corporation may embark in enterprises other than those contemplated at its inception, the public may lose the expected benefits, and the stockholders the anticipated profits, through the losses of unprofitable speculations, and the inability of the corporation to prosecute the original enterprise, or through an entire change of its original objects and purposes. And as all persons dealing with a corporation are presumed to know the extent of its powers as conferred by its charter, or the public statutes, a party entering into a contract with it in relation to a matter not within these powers should not be heard to complain that such contracts are void.

But we shall hereafter notice that this doctrine has been somewhat qualified and relieved of its severity.

Application of the doctrine in suits on contract at law in England.—*The East Anglian Railways Company v. Eastern Counties Railway Company* is said to be the first case where the question of *ultra vires* was distinctly presented in an English court of law. This decision was soon followed by another, *Macgregor v. Dover & Deal R. Co.*, 18 Q. B., 618; 22 L. J., Q. B., 69, in the Exchequer Chamber, on a writ of error from the Queen's Bench. The facts in this case were as follows: Macgregor, the plaintiff in error, as chairman of the Southeastern Railway Company, had covenanted with the managing committee of the proposed Dover & Deal Railway Company that, in consideration of their not abandoning their project and intention of applying to Parliament for an act to authorize the making of the proposed line, the Southeastern Railway Company would, in case of rejection of the scheme, insure the company against loss which might be occasioned to such proposed railway company by such rejection and failure, and would defray and pay all expenses incurred by them in endeavoring to obtain the act. The Southeastern Railway Company, by their acts, were authorized to apply their funds for certain purposes only, not including the payment of the costs of the proposed proceedings in Parliament. The Queen's Bench sustained the contract as valid, but the Exchequer Chamber held that the agreement was void. ALDERSON, B., *inter alia*, said: "The question, we think, is determined by the Court of Common Pleas in *The East Anglian Railways Company v. The Eastern Counties Railway Company.* It is there laid down that a railway company, incorporated by act of Parliament, is bound to apply the funds of the company for the purposes directed and provided by the act, and for no other purpose whatever, and these defendants having, *inter alia*, covenanted to pay the costs of soliciting bills then pending in Parliament, it was held that the act incorporating the defendants, being a public act, must be presumed to be known to the plaintiffs; and that they could not recover, inasmuch as the covenant entered into by the defendant was beyond the scope of their authority as a corporation, and was, therefore, illegal and void. The court there say, such a contract is il-

legal, because it is contrary to the act of Parliament, which was passed to give them certain powers as a corporation for public purposes, of advantage to the country at large, as well as for the private gain of the individual members of the corporation; and they add, that the actual assent of the whole body of shareholders would make no real difference in the matter. If this be so, both the plaintiff and the defendants here must be taken to have full knowledge of the powers conferred on the Southeastern Railway Company, to have made a contract by which the defendant is to bind that company to do an illegal act; not merely an act which they have not power to do, but an act contrary to public policy and the provisions of a public act. This we think is a void contract, and one which, therefore, could not form the proper ground for a suit in a court of law. The declaration is, therefore, we think, bad; and the judgment ought to have been arrested, and ought now to be arrested in this court. We think, therefore, the judgment of the Queen's Bench must, for these reasons, be reversed, and the judgment must be arrested."

These cases have ever since been followed and approved by the English courts. In *Munsel v. Midland Great Western R. Company*, 1 H. & N., 130; and in *Spackman v. Lattimore*, 3 Giff., 16, it was held that agreements made by railroad companies to contribute to promote bills in Parliament were *ultra vires* and void.

Contracts for personal influence and solicitations to procure the passage of acts, generally void in this country.—It may be observed that in this country a promise to pay for services as a lobby agent, or for one's personal influence and solicitations to procure the passage of a public or private act by the legislature of a State, or by Congress, is void, as being against public policy; and no recovery can be had for such services either on a special contract, or a *quantum meruit*. In *Powers v. Skinner*, 34 Vt., 217, KELLOGG, J., observes: "Courts of justice have, with jealous care, endeavored to protect every branch of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit and tendency, that an agreement in respect to services as a lobby agent, or for the sale by an individual of his personal influence and solicitations to procure the passage of a public or private law by the legislature, is void, as being prejudicial to sound legislation, manifestly injurious to the interests of the State, and in express and unquestionable contravention of public policy." *Clippenger v. Hepbaugh*, 5 W. & S. (Penn.), 315; *Wood v. McCann*, 6 Dana (Ky.), 366; *Marshall v. Baltimore & Ohio R. Co.*, 16 How. (U. S.), 314; *Harris v. Roof's Executors*, 10 Barb. (N. Y.), 489; *Rose v. Truax*, 21 Id., 361; *Bryan v. Reynolds*, 5 Wis., 200.

The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done, under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men. A person may, without doubt, be employed to conduct an application to the legislature, as well as to conduct a law-

suit, and may contract for, and receive pay for his services in preparing and presenting a petition or other documents; in collecting evidence, in making a statement or exposition of facts, or in preparing an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. The personal and private nature of the services to be rendered is the point of illegality in this class of cases. *Sedgwick v. Stanton*, 14 N. Y., 289.

Our government, in theory, is founded upon the most exalted public virtue, and the principle which forbids the legal recognition of any contract for such services is so essential to the purity of the government, and is so firmly established as a rule of public policy, that it requires no vindication. It appears from the reported facts in the case, *Powers v. Skinner*, that the suit was upon an agreement to pay the plaintiff $500, in consideration of faithful labors before the legislature for a charter of a bank at Royalton. He was "energetic, shrewd, laborious, and faithful"; "was a doctor and not a lawyer, and was employed by reason of his ability, and the facilities he possessed to influence the legislature; and his former position in the house of representatives, and familiarity with legislation and with members, was one of these facilities." "He was expected to, and did, solicit members of the legislature in behalf of his project as he had opportunity," and the project succeeded.

The court seems to have found, from the facts in the case, that the parties intended to use improper means to secure the charter.

The validity of agreements of this character has since been before the Court of Appeals, in New York.

Mills v. Mills, 40 N. Y., 543, was an action to compel the specific performance of an agreement to convey certain real estate, executed by the defendant in consideration, among other things, that the plaintiff "would give all the aid in his power, and spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law of a bill that had been then recently introduced into the Senate of the State of New York, granting to the defendant and others a franchise for a railroad on Division Avenue, in the county of Kings, in said State, and for the operation of trains of cars thereon, or any other bill to the same end." The plaintiff further agreed, as a part of said consideration, that he would not "in any way co-operate or conspire with any other person whomsoever at the introduction into either branch of the legislature, or elsewhere, of any proposition for the construction of any railroad whatever on Division Avenue, in the county of Kings, or in any way give aid or countenance to any such measure." In the opinion by HUNT, C. J., he observes: "It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate, and which right or debt he proposed to transfer to the defendant. He had simply

asked of the legislature the privilege or favor to be granted to him of building and operating a railroad upon certain streets in the city of Brooklyn. This privilege may be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. The contract is void as against public policy. It is a contract leading to secret, improper, and corrupt tampering with legislative action." * * * "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to these results. It furnishes a temptation to the party to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character and fatal to public confidence in its action. See, also, *Fuller v. Dame*, 18 Pick., 479; *Frost v. Belmont*, 6 Allen, 159; *Clippinger v. Hepbaugh*, 5 W. & S., 315.

In *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 314, Mr. Justice GRIER observed: "Influences secretly urged under false and covert pretenses must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them—he is soon brought to believe that any means which will produce so beneficial a result to himself, are 'proper means,' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption commencing with the legislator and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome '*Omne Romæ venale.*'"

These cases will be sufficient to indicate the disfavor which contracts for the procurement or promotion of bills receive in our courts. In the English courts no questions of the kind seem to have been presented.

Application of the doctrine in this country in suits at law, on contract for the payment of money.—Following the preceding leading English case, where the doctrine of *ultra vires* was applied in a suit at law, we have several American cases.

In *Pearce v. Madison & Indianapolis R. Co., and Peru & Indianapolis R. Co.*, 21 How. (U. S.), 441, the facts were as follows: The defendants were separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connected at Indianapolis, in that State. The two corporations, defendants, sometime before the date of the notes sued on, were consolidated by agreement, and assumed the name of the Madison, Indianapolis & Peru Railroad Company, and in that name, and under a common board of management, conducted the business of both lines of road. While the business of the two companies was thus directed

and managed, the president of the consolidated company gave the notes sued on, in its name, in payment for a steamboat, which was to be employed on the Ohio River, to run in connection with the railroads.

After the execution of the notes and the acquisition of the boat, this relation between the corporations was dissolved by due course of law, and, at the commencement of the suit each corporation was managing it own affairs. The plaintiff claimed that the two corporations were jointly bound for the payment of the notes, but the circuit court, where the suit was brought, sustained a demurrer to the declaration.

On error in the Supreme Court of the United States, Mr. Justice CAMPBELL, who delivered the opinion of the court, said: "The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana, under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants, respectively, to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by acts of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment; and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority."

In *McGregor v. The Official Manager of the Deal & Dover R. Co.*, 16 L. & Eq., 180 (18 Q. B. 618), it was considered that a railway company incorporated by act of Parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond this was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of Parliament, must be taken to be known to the whole world.

In *Coleman v. The Eastern Counties Railway Company* (10 Beav., 1; see *post*, tenth selected case, Ch. V), Lord LANGDALE, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and claimed that similar arrangements were not unusual among railway companies. But Lord LANGDALE said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those thing required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it

has been very properly admitted that railway companies have no right to enter into new trades or businesses, not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit of the shareholders. There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament under which the acts are done, they furnish no authority whatever."

In *The East Anglian Railways Company v. The Eastern Counties Railway Company* (11 C. B., 803), the court held that the statute incorporating the defendant's company gave no authority respecting the bills in Parliament promoted by the plaintiffs, and that, therefore, any contract relating to such bills was not justified by the act of Parliament, and not within the scope of the authority of the company as a corporation, and was, therefore, void.

These cases illustrate the principle upon which the decisions have been made to rest. It is not a new principle in the jurisprudence of this country. This doctrine was enunciated in the early case of *Head v. Providence Insurance Company* (2 Cr., 127), and has been re-affirmed in a number of others. *Bank of Augusta v. Earle*, 13 Pet., 519; *Perrine v. Chesapeake and Ohio Canal Company*, 9 How., 172.

In *Pearce v. The Madison & Indianapolis R. Co.*, it was contended that because the steamboat was delivered to the defendants and had been converted to their use, they were responsible. But the court said, in reply to this, that the plaintiff was not the owner of the boat; that he had no assignment of the owner's interest; that the suit was instituted on the notes by plaintiff, as indorsee, and that the only question was, had the corporation the capacity to make the contract, in the fulfillment of which they were executed? The opinion of the court was, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

Remarks.—The decision in *Pearce v. The Madison & Indianapolis R. Co.* was rendered in 1858, since which there have been others in the same court that would appear to require some qualification of portions of the opinion of the learned judge in that case. It does not appear clearly from the statement of the case whether or not the promissory notes sued on were negotiable promissory notes, or whether or not the plaintiff was a *bona fide* holder of them, for value, which have since been considered as material questions to be considered in such cases where the corporation had power to make such instruments for any purpose. And railroad corporations have such power. But it would appear from the case, as reported, that no objection on these grounds existed, as no reference is made in the opinion to defects of this kind, which would, probably, otherwise have received some notice by the learned justice.

Recent cases qualify the doctrine.—In several recent cases the courts of this country at least have been disposed to favor the validity of the negotiable paper of corporations in the hands of *bona fide* holders for value, although the execution of it was an abuse of authority, and in one sense *ultra vires*.

Relating to this subject the following broad proposition has been made: "If there is nothing on the face of negotiable instruments executed by a corporation to indicate that they are *ultra vires*, and it had power to issue such instruments in the conducting of its legitimate business, a defense on that ground could not be set up to defeat a recovery thereon by a *bona fide* holder for value, without notice of the excess of authority in issuing them for the particular purpose for which they were issued." Field on Corp., § 270. See, also, *post*, Ch. II, selected case, *Monument National Bank v. Globe Works*.

Franklin Company v. Lewiston, Hoagland v. Hannibal & St. Joseph R. Co., following Pearce v. Madison & Indianapolis R. Co.—It was held in *Hoagland v. The Hannibal & St. Joseph R. Co.*, 39 Mo., 451 (1867), that a corporation chartered with power to build a railroad from one point to another, and to transport passengers and freight, has no authority to run a line of steamboats in connection with the road. The defendant owned a line of steamers on the Missouri River, and the manager of the line was conducting it as the agent of the defendant. It was run as a separate line of transportation under the name of the Missouri River Packet Line, though in connection with the railroad. The court held, that the "corporation had no power by the charter, nor have the officers and agents of the company any authority by law, to run a line of steamers on the Missouri River as a part of the company's line of transportation, and all contracts made beyond the authority given by their charter were utterly void." See, also, similar decisions of courts of other States, and of the United States. *The Pennsylvania & Delaware Navigation Co. v. Dandridge*, 8 Gill. & J., 248; *Hood v. New York & New Haven R. Co.*, 22 Conn., 502; *Elmore v. Naugatuck R. Co.*, 123 Id., 457; *Mutual Savings Bank v. Meridian Agricultural Co.*, 24 Id., 159; *Naugatuck R. Co. v. Waterbury Button Co.*, Id., 468; *Orr v. Lacy*, 2 Mich., 254; *Root v. Goudard*, 3 McLean, 102.

Application in American case on contract.—As early as 1836 the doctrine of *ultra vires* was applied in an action on contract, in the case of *The Pennsylvania, Delaware & Maryland Steam Navigation Co. v. Dandridge*, 8 Gill. & J., 248. The facts relating to the case were these: The defendant in the court below was a coporation created "for the purpose of establishing and conducting a line or lines of steamboats, vessels, and stages, or other carriages between Philadelphia and Baltimore, for the conveyance of passengers, and transportation of merchandise and other articles," and undertook to take two sail vessels, one then being laden with "certain goods, chattels, wares, and merchandise, from, and out of the ice, and from, and out of the harbor and port of Baltimore," into the open waters of Chesapeake Bay, in consideration of $33.33⅓ for each vessel, to be paid. The goods, etc., had been

placed on the vessel for transportation to the Shenandoah River in the State of Virginia, and the vessels had been "delayed in consequence of the gathering ice in the Patapsco River and Chesapeake Bay." It further appears that the defendants had a steamboat at said port of Baltimore, and that the route contemplated by the parties was substantially the route taken by such steamboat in voyages between Baltimore and Philadelphia. It further appears that the defendants entered upon the performance of the agreement, received the consideration agreed upon, and towed out the plaintiff's vessel, with several others; one steamboat belonging to the defendant going ahead and breaking the ice, and another steamboat, which had been engaged by them for the purpose, towing the several vessels to a place several miles distant from Baltimore, where the fasts of a vessel ahead of the plaintiff's in the line of the tow gave away, but the steamboat proceeded leaving the plaintiff's vessel, as well as others, and although returning some hours afterwards, the captain refused to either tow the defendant's vessels to the open water, or back to Baltimore; that the vessels could not be got out of the ice, but froze up in it, and that a storm afterwards arose destroying them and the cargo, as alleged, in consequence of the neglect and refusal of the defendants to perform their promise, and to recover the value of which the action was brought. On the trial the defendants asked the court to instruct as follows:

"2. That the charter granted to the defendants limits them to the pursuit of particular objects specified in that charter, and that the breaking of ice and towing vessels through the track thus broken, such vessels being destined for Virginia, is not one of the objects about which they could empower their agent to contract, and for which he could contract for them, at all events not without a special power conferred for that purpose, or a subsequent ratification by the company of such contract."

This instruction, with others offered by the defendants, was refused. Judgment was rendered for the plaintiff for $2,247.79½. On appeal the court observed: "In deciding whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent on the subject; in the second place, whether a power to make a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to that purpose." * * * "According to these wise and now well established principles the appellants had no power to bind themselves by such a contract as that attempted to be enforced against them, and possessing none themselves they could not delegate it to * * * their agent. At the instance of the defendants the court should have granted the direction prayed for. The instruction should have been given without the qualification attached to it."

The extreme views above expressed were also held in the case of *Conover v. The Norwich & New York Transportation Co.*, 33 Conn., 166, decided in 1865; and *Hood v. New York & New Haven R. Co.*, 22 Id., 502; *Harding v. Steamboat*, 5 L. Rep., 106.

A more liberal view of incidental powers in Massachusetts in 1865.—In *Brown v. Winnissimmet Company*, 11 Allen (Mass.), 326, where the company was incorporated with power to establish, continue and maintain a ferry between the city of Boston and the town of Chelsea, and was authorized to own, hold and possess vessels, steamboats and such other personal property, not exceeding in value $100,000, as might be necessary and convenient for the better management of such ferry and the affairs of such corporation, the court would not say that a contract by the company to let one of its steamboats at a certain rate per day, to be used for no specified length of time, and in no specified place, was in excess of its corporated powers, where there was no proof that the boat was not necessary or proper to be used in the prosecution of the business of the ferry, or that by reason of owning it the company exceeded the limits of property which it was authorized to hold. The action in this case was for commissions due and expenses incurred by the plaintiffs in procuring a charter of an iron ferry-boat of the defendants, and one of the grounds of defense was that the charter of the boat by the defendants, and the agreement to pay commissions and expenses therefor, was *ultra vires*. There was judgment for plaintiffs.

The main defense to the action appears to have been that the contracts or agreements on which the plaintiffs relied in support of their claim against the defendants, were such that the latter had no power or authority to make them under the act of the legislature by which they were incorporated, and that they could not for that reason be enforced in a court of law. BIGELOW, J., observed: "The later English authorities seem to sanction the doctrine that such a ground of defense, although it may be 'unbecoming and ungracious,' or in the stronger language of Lord ST. LEONARDS, 'indecent,' is, nevertheless, legal and valid, if it be made to appear, either by the express provisions of an act of incorporation, or by necessary and reasonable implication therefrom, that a contract which is sought to be enforced in an action at law against a corporation is beyond the scope of the powers granted by its charter; or, in other words, that the legislature did not intend that the body created by them should enter into contracts of a character like that which a plaintiff makes the foundation of a claim against it. *South Yorkshire R. Co. v. Great Northern Railway*, 9 Exch., 55; *Bateman v. Ashton-under-Lyne*, 3 Hurlst. & Norm., 323; *Norwich v. Norfolk R.*, 4 El. & Bl., 397; *Hawks v. Eastern Counties R.*, 1 De G., M. & G., 737. * * * We have no occasion now to examine at length into the correctness of this doctrine, or to ascertain with precision its proper limitations or operation, because we are of opinion that the defendants do not bring the case at bar within any recognized application of the rule. * * * We know of no rule or principle by which an act creating a corporation for certain specified objects, or to carry on a particular trade, or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly, the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business,

or it may become necessary, expedient or profitable, in the care and management of the property which it is authorized to hold under the act by which it was created. For example, it might, perhaps, be held that a corporation established for the purpose of manufacturing cotton and woolen cloth could not properly invest all its capital in mill-powers and privileges, and engage exclusively in the business of leasing them to others to be used for manufacturing purposes, or that it could not lawfully confine its operations to the making of steam-engines and machines for sale. But no one could doubt that it would be within the scope of its powers to allow another person, or corporation, for a reasonable compensation, to draw surplus water from its mill-pond, or to employ that portion of its steam-power which was not required for its own use. So a stage-coach company, or a street railway corporation, would exceed its corporate powers if it engaged extensively in the transportation of passengers and merchandise on land and sea by steam, but it would be acting strictly within the limits of its capacity if it should let a horse, or a coach, or a car, not required for its own immediate purposes, to another person or corporation, or should enter into a contract for the employment of its horses in another occupation during a portion of the year when the business of the corporation did not require their use. We can see no substantial difference between transactions of this character and that which the defendants entered into when they made the contracts with the plaintiffs."

Remarks.—But would it not be more agreeable to principles of justice to hold the corporation responsible for contracts made in the execution of the *ultra vires* enterprise supposed by the learned judge? Where the unauthorized enterprises are the result of the unanimous will of all the stockholders, or of the agents they have constituted, and whose acts they have expressly or impliedly approved, is there any reason or sound principle that should shield the company from contracts, made and entered into in the due execution of them? The current of authority holds private corporations liable for the torts of servants, as we shall hereafter see, even where the torts are committed in the execution of *ultra vires* pursuits and enterprises. What reason is there for a distinction? Why should the corporation be held for an unintentional trespass committed by an agent, in the execution of an *ultra vires* business, authorized by the corporation, but be relieved from an *ultra vires* contract authorized in the same way?

The argument in support of the doctrine that the stockholders might suffer unless protected by it, loses all its force where they are unanimous in their desires for the *ultra vires* act. And the dissentient ones always have a remedy in equity by injunction, which we will hereafter consider. But the more extreme doctrine tolerates the plea of *ultra vires*, not only where they have assented, but where they have knowingly reaped the benefit and appropriated the consideration of the *ultra vires* contract. We shall show hereafter, however, that this doctrine has been qualified if not entirely overthrown. One argument, it may be said, remains; namely, that the State, the sovereign granting the franchise, is interested in limiting the acts of corporations within the powers conferred, and that public policy requires it. But we shall hereafter show the remedy of the State in such cases.

The same doctrine maintained in England in 1861.—A corporation authorized to keep steam vessels for the purposes of a ferry may use them for excursion trips.—In *Forest v. Manchester R. Co.*, 30 Beav., 40, the same doctrine maintained in the preceding case was also held in the English Rolls Court, in 1861. A railway company possessing the usual powers was also authorized to establish and maintain "steam and other boats, etc., for the conveyance of carriages, horses, cattle, goods, wares, merchandise and other portable articles and foot passengers over and across the river Humber," at a certain designated place, and to and from certain points on opposite sides of the river. The company had for the purposes of the ferry, eight steamers, and had for ten years used them, when not otherwise required for the ferry service, in taking passengers on excursion trips to Spurn Point, a headland running into the German Ocean, at a distance of twenty-eight miles from Hull. The plaintiff, who was a stockholder, commenced a suit, in which he claimed that such a practice was not sanctioned by the powers given to the railway company, and praying a declaration that the railway company were not authorized to convey in boats or vessels, passengers, etc., to and from Spurn Point, etc. On this question Sir JOHN ROMILLY, Master of the Rolls, expressed his opinion as follows: "The evidence shows, as it may reasonably be supposed, that there are particular days, such as market and fair days, upon which the traffic between the two points of the ferry is greater than upon other days. By reason of the obligation which they have entered into with the legislature and the public, the company are bound to provide sufficient accommodation to take everybody on those days. It may well be that the traffic, on those days, may be double of that upon ordinary occasons. The defendants state that the traffic is much greater on some days than on others, which is all that is required for the purpose of establishing the point. Upon those days they require a larger number of steamboats than they do upon other days. The evidence satisfies me that the steamboats are kept for the purpose of performing the obligation which the company have entered into with the legislature, and with the public through the legislature, and which they are bound to perform. What are they to do with those steamboats at other times when unemployed at the ferry? Are they to keep them idle? I am of opinion that they are not; and that if the capital of the company is really embarked for the purpose of the ferry and not for the purpose of excursions, when the steamboats are not required to carry over the persons who wish to use the ferry they are at liberty to use them as they think fit for the profit of the company, and either to let them out to private parties for excursions, or to carry excursion parties themselves. In both cases, it appears to me, that they are neither contravening the object of the provisions of the legislature, nor violating the principle upon which they are established, which is, to carry any person who may require it over the ferry. Accordingly, I am of opinion that the company are justified in acting as they have."

Another English case adopting the broader doctrine.—In *Simpson v. Westminster Palace Hotel Co.* (Limited), 2 De. G. F. & J., 141; 29 L. J. Ch., 561; affirmed, 8 H. L. C., 712, where the company was created for the purpose of building a hotel and of "carrying on the usual business

of a hotel and tavern therein, and of doing all such things as are incidental or otherwise conducive to the attainment of the above objects"; and the company built a large hotel, containing 317 rooms, but before it was opened the directors, with the assent of a majority of the shareholders, agreed to let a portion of the rooms, to-wit, 169 rooms, for offices, to the India Board, at a rent of 6,000*l.* a year, for the term of three years, with the privilege of the Board to extend it to five years. The directors further agreed to make some alterations to accommodate the Board, which would cost about 2,000*l.*, and cause a further expense at the expiration of the lease in restoring the rooms to a condition suitable for hotel purposes. This lease was entered into by the directors of the hotel company because they believed that there would not be a demand for so large a hotel at first, and because they had not sufficient capital to open the whole at once. It was held that the agreement was not *ultra vires*, and that the court ought not to restrain the execution of the agreement. See, also, *Horsey's Claim*, L. R., 5 Eq., 561; 37 L. J. Ch., 395.

Implied incidental powers.—In *Moss v. Averill*, 10 N. Y., 449, the action was against a stockholder, under the provisions of the statute of New York making stockholders liable for debts contracted by the corporation, to recover on two promissory notes made by the corporation as the consideration of a sale to the corporation of certain real and personal property, consisting of a smelting-house and shops, pots, moulds, implements and machinery, which had been used in the business of washing and smelting lead on the premises by the vendors. The corporation was created "for the purpose of raising and smelting lead ore." The real estate embraced about fifty acres, and one of the shanties thereon had been used as a school-house for the children of the workmen formerly employed in the business. The company also assumed a certain engagement of the payees of the notes, who had been carrying on the business for some time previous, by which they had rented lake vessels to certain parties, and agreed that all ore smelted by them, or their assigns of the smelting works, should be transported to market by the latter, who were engaged in the transportation business.

In this case WILLARD, J., observes: "No question is better settled upon authority than that a corporation not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day or upon demand, when such note is given for any of the legitimate purposes for which the company was incorporated. * * * On the argument, great stress was laid upon the objection that the corporation had no right to make the purchase of the smelting works; and certainly not of the building called the school-house, and the implements of husbandry mentioned in the inventory. * * * Had the corporation subscribed $15,000 for the erection of a chapel to Union College, or purchased a farm for an agricultural seminary, or a wholesale store in the city of New York, for the general purposes of trade, it would not have been denied that those acts were unauthorized by the charter. In a case so strongly marked as the one supposed, the judge at the circuit would have been authorized to non-suit a plaintiff, if the sustaining of the action required the acknowledgment of the validity of those acts, or to direct a verdict in conformity to the law. But where a case is not so strongly marked,

where the property purchased falls within the general scope of the charter, and the only objection is that some articles apparently unnecessary are included, the good faith of the purchaser should be sumbitted to the jury."

In reference to the contract for the transportation of their ores the court further remarked: "The powers conferred upon the corporation by the charter were broad enough to authorize them to transport their lead to market. It could not have been supposed by the legislature that the ore when smelted should remain in the woods of Rossie until purchasers came to buy it. The company had a right to adopt any reasonable mode of transporting it to market. * * * If they could contract for sending one ton to market they could contract for sending to market by a single company the whole product of the season." See, also, *Morgan v. Donovan*, 58 Ala., 241. In harmony with this case are the views of Mr. Justice EARLE, in the English case of *Mayor of Norwich v. Norfolk R. Co.*, 30 Eng., L. & E., 120; 4 E. & B., 396; 24 L. J., 105. He says: "The question put in the course of the argument, 'Would a contract by a railway company for a theater or chapel be void?' exemplifies the doctrine. It might, or it would not, according as the purpose of the contracting parties was or was not connected with the railway. It might be a speculation separate from the railway, and prohibited. Or, if works were wanted in a waste place, and the company found it for their interest to build a town and supply it with all the requisites of habitancy, and, in order to secure a permanent supply of workmen of skill and responsibility, added a chapel or a theater, with religious or secular instruction, it might be for the interest of the railway and valid; and, though distantly connected, the outlay might be found eventually to increase the profit from the traffic." And in the same case, which was a suit from covenant, Lord CAMPBELL says: "The mere circumstance of a covenant by directors in the name of the company being *ultra vires* as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under the seal of the company for the purchase of a large quantity of iron rails, and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purpose of the railroad, it would be no defense to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee, and he being in *pari delicto*, I conceive that the maxim would apply *potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company, and the illegality might be set up as a defense. So if without any consideration whatever the directors of a railway company were to put the company's seal to a deed covenanting to pay a mere stranger 1,000*l.*, this would be *ultra vires* to the knowledge of the covenantee, and he could not maintain an action to recover the 1,000*l.* from the funds of the company, in fraud of the shareholders."

Remarks.—In the case of bonds, coupons and other negotiable paper, as we shall hereafter show, if they are formally executed, and the corporation had power to make such instruments for any purpose, and they are made and delivered for a purpose that is in fact *ultra vires*, they still have all the qualities of ordinary commercial paper in the hands of a *bona fide* holder for value.

In the supposed case of Judge ELDON, of the building of a "theater or a chapel," and those of Judge CAMPBELL, of the purchase of "iron rails" and "green spectacles," the application of the doctrine is made to depend upon the intention of the parties. And according to the current of authority, if negotiable instruments were issued therefor the doctrine would not apply to a *bona fide* holder of them for value. In fact, from the reasoning in the case of *Mayor of Norwich v. Norfolk R. Co.*, it would only be necessary for the vendor, in the supposed case of the spectacles, to act in good faith; and from the general reasoning in the other cases it would not be impossible for a sale of a "thousand gross of green spectacles" to be made to a railroad company in good faith, and be within the scope of its authority to purchase. We could imagine a case where it would be legitimate for them to make such a purchase, and where the contract would be binding, within the reasoning and the general principles of the cases. But who shall determine the question whether void or valid?

Is it a question to be determined by the court as one of law? It would appear to be one that must depend upon the facts and circumstances of the case; and especially upon the *bona fides* of the party dealing with the company, where he seeks the enforcement of the contract. In such a case it must present a question of fact, appropriate for the finding of a jury. On the other hand, if the corporation has executed a negotiable instrument, for the consideration of some contract entered into by them, which is in fact *ultra vires*, and on this ground might defeat a recovery by the other party to the contract or the payee of the instrument, still this would not avail them in a suit by a *bona fide* holder of the intrument for value if the corporation had authority to make such instruments for any purpose. See *post*, Ch. II, third selected case and notes.

Other incidental powers, not ultra vires.—Among the incidental powers that a corporation may exercise is the power to act through its officers and agents, outside the limits of the jurisdiction of the State or sovereignty creating it, unless prohibited by its charter or positive statutory enactment. The only controversy in relation to such acts is, whether they are the acts of the corporate body or the acts of the officers or agents. In *Galveston R. Co. v. Cowdry*, 11 Wall., 476, it was observed: "It is next objected that the mortgages were not properly executed, because the meeting of the directors by which the mortgages were authorized to be executed were held in the city of New York. It is not denied that the mortgages were executed in good faith under the corporate seal, and signed by the president and countersigned by the treasurer of the company, and duly recorded in the proper offices of registry in the State of Texas. No doubt it can be true in many cases that the ex-territorial acts of directors would

be held void; as where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory, and may sue and be sued therein."

CHAPTER II.

ULTRA VIRES, NOT APPLICABLE TO THE COMMERCIAL PAPER OF A MANUFACTURING CORPORATION IN THE HANDS OF A BONA FIDE HOLDER. AUTHORITY TO MAKE SUCH PAPER IS INCIDENTAL TO CORPORATE POWER.

THIRD SELECTED CASE.

MONUMENT NATIONAL BANK v. GLOBE WORKS.*

The note of a manufacturing corporation in the hands of a holder in good faith for value, who took it before maturity, and without knowledge that the maker had not received full consideration, can be enforced against the corporation, although it was made as an accommodation note.

HOAR, J.—The single question presented for our decision in this cause, all others which arise upon the report having been waived, is whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was, in fact, made as an accommodation note.

The argument for the defendant takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation, and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were, therefore, bound to ascertain not only that it was executed by the officer

* Reported in 101 Mass., 57 (1869).

of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defense cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Narragansett Bank v. Atlantic Silk Co.*, 3 Met., 282. And it was held in *Bird v. Daggett*, 97 Mass., 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in *Bird v. Daggett;* but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much further in England than the courts of this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned that the limitations to the authority, powers and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by SELDON, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.*, 22 N. Y., 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could

not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw., 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord ST. LEONARDS, that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas., 331, 373. The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting party had notice

upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

JUDGMENT FOR THE PLAINTIFFS.

COMMERCIAL PAPER NOT HELD BONA FIDE.

FOURTH SELECTED CASE.

FRANKLIN COMPANY v. LEWISTON SAVINGS INSTITUTION FOR SAVINGS.*

Corporations possess such powers, and such only as the law of their creation confers upon them; and when created by public acts of the legislature, parties dealing with them are chargeable with notice of their powers, and the limitations upon them, and cannot plead ignorance in avoidance of the defense of *ultra vires*.

The trustees of the Lewiston Institution for Savings subscribed for $50,000 of the capital stock of the Continental Mills, and having no money to pay for it, the Franklin Company, another corporation, paid that amount to the Continental Mills, taking the notes of the Savings Institution therefor, and a certificate of the stock in their own name as collateral security for the payment of the notes. *Held*, that the action of the trustees of the savings institution was *ultra vires;* that it is not within the authority of savings institutions, at a time when they have no funds for investment, to purchase stocks or other property, not needed for immediate use, on credit, and thus create a debt binding upon the institution; that the Franklin Company, having participated in the illegal transaction, could not claim the privileges of a *bona fide* holder of com-

*Reported in 68 Me., 43 (1877).

mercial paper; and that the savings institution, having received no benefit from the transaction, was not estopped to set up the defense of *ultra vires*.

Semble, upon the authorities cited, that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law.

WATSON, J.—The claim which we are required to pass upon originated in this way: In April, 1875, the trustees of the Lewiston Institution for Savings subscribed for $50,000 worth of the capital stock of the Continental Mills, one of the manufacturing corporations doing business at Lewiston. The savings bank had no money with which to pay for the stock, and in July following the Franklin Company, another corporation doing business at Lewiston, agreed to pay $50,000 to the Continental Mills, take the notes of the savings bank for the amount, and hold the stock as security. Five notes for $10,000 each, payable in one year from date, with interest semi-annually, were prepared and signed by the treasurer of the savings bank and sent to William B. Wood, at Boston, and he being treasurer of the Continental Mills, as well as treasurer of the Franklin Company, paid the money in his latter capacity to himself in his former capacity, and afterward (which does not appear) made a certificate, signed by himself and the president of the Continental Mills corporation, stating that the Franklin Company was the "proprietor of five hundred shares in the Continental Mills as collateral." It does not appear that this certificate was ever delivered to the savings bank, or offered to them, or that any of its officers ever knew of its existence. And it does not show upon its face that the savings bank has any interest in the stock, or any connection with it whatever. The Lewiston Institution for Savings became insolvent in May, 1876; commissioners were appointed to receive and decide upon all claims against the institution. The Franklin Company presented for allowance the five notes above described and afterward filed a claim for $50,000 and interest, as so much money paid out by the Franklin Company at the request and for the benefit of the savings institution. Both claims were rejected by the commissioners and the case is before the law court on report agreed to by counsel. There

is no other consideration for the notes and no other basis for the claim for money paid than the payment to the Continental Mills above described. The claims, therefore, are one in substance, although presented in two forms.

I. The first question is whether it is competent for the trustees of a savings bank, at a time when there are no funds in the bank for investment, to agree to take shares in a manufacturing corporation, and thereby create a debt binding upon the bank.

We think not. It is familiar law that a corporation possesses such powers, and such only, as the law of its creation confers upon it. The rule is stated with great uniformity:

"A corporation has only such powers as are specifically granted, or such as are necessary for carrying the former into effect; and these powers can only be exercised for the purposes contemplated by its charter." Brightley's Federal Digest, citing *Humphreville Copper Co. v. Sterling*, 1 West. L. Mo., 126; *Beaty v. Knowler*, 4 Pet., 152; s. c. 1 McL., 41; *Perine v. Chesapeake & Delaware Canal Co.*, 9 How., 172; *Farnum v. Blackstone Canal Co.*, 1 Sum., 46.

"A corporation can do no acts and make no contracts, either within or without the State which created it, except such as are authorized by its charter." Br. Fed. Dig., citing *Bank of Augusta v. Earle*, 13 Pet., 519; *Tombigbee R. R. Co. v. Kneeland*, 4 How., 16; *Runyan v. Coster's Lessee*, 14 Pet., 122.

"A corporation being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." MARSHALL, C. J., in *Dartmouth College v. Woodward*, 4 Wheat., 518, 636.

"An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." *Hood v. N. Y. & N. H. Railroad*, 22 Conn., 1 and 502.

As corporations are created by public acts of the legislature, and all their powers, duties and obligations are declared and clearly defined by public law, parties dealing with them must take notice of those powers and the limitations upon them at their peril, and will not be allowed to plead ignorance

of those powers and limitations in avoidance of the defense of *ultra vires*. *Pearce v. Mad. & Ind. Railroad*, 21 How., 441; *Andrews v. Ins. Co.*, 37 Maine, 256.

"In the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law." Green's Brice's *Ultra Vires*, 95, note, citing a large number of authorities.

"It certainly needs no argument or authority to show that a corporation created for the purpose of insurance has no power to advance its moneys or obligations to sustain another corporation in a similar or dissimilar business." Opinion of the court in *Berry, Receiver, v. Yates*, 24 Barb., 199.

"When the directors of the company subscribe for stock in a building corporation, whatever may have been their motive, they transcended the powers conferred upon them, and departed from the legitimate business of the company, as much as if they had subscribed for stock in a manufacturing or steamboat company; and such subscription, in our opinion, is not binding upon the defendants, and any payment made upon it to the plaintiffs would be money received without consideration." Opinion of the court in *Mutual Savings Bank v. Meriden Agency Company*, 24 Conn., 159.

If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow; and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectible. *Sumner v. Marcy*, 3 W. & M., 105. That the notes given by a railroad corporation, for the purchase of a steamboat to be run in connection with its road, are not collectible. *Pearce v. Railroad*, 21 How., 441.

It would seem, therefore, upon principle as well as authority, that it is not within the authority of the trustees of a savings bank to invest its funds in the stock of manufacturing corpor-

ations, unless expressly authorized so to do by its charter, or the public laws of the State.

But we do not rest our decision upon this ground. We rest it upon the broader ground that it is not competent for the trustees of a savings bank to purchase on credit property of any kind, not needed for immediate use, or the investment of existing funds. No such power is expressly conferred upon them; nor do we think it can be sustained as an incidental power. It is suggested that it may be convenient in this way to provide, in advance, for the investment of funds that may afterwards come into possession of the Bank. We think the creation of debts, by corporations or individuals, for no other purpose than to provide a ready way to dispose of future acquisitions, a proceeding of very questionable convenience; that in the great majority of cases, it would be likely to prove, as it did in this case, very inconvenient. But it is a sufficient answer to say that the law imposes no duty upon the trustees of savings banks to provide for the investment of future funds or future deposits. Their whole duty is performed when they have provided safe investments for the funds already committed to their care. To hold that they may create debts binding upon existing depositors for the benefit of future depositors, whose money, after all, may never be committed to their care, would be a doctrine as startling as it would be unprecedented.

II. The second ground on which the claim of the Franklin Company is sought to be maintained, is this: It is said that where a corporation is authorized to hire money for any purpose, mere knowledge on the part of the lender that it is to be used for an illegal purpose will not prelude a recovery. This may be true. But the claim in this case is not for money lent. It is for money paid. And the latter is the only claim which the evidence tends to support. Ordinarily such a distinction is unimportant. But in this case it is vital. It is the hinge on which the case turns. It may be true that when money is lent, and the borrower is left free to use it as he pleases, mere knowledge on the part of the lender that the borrower intends to use it for an illegal purpose will not bar a recovery. But it is well settled that if it be a part of the agreement that the money shall be used for an illegal purpose,

or anything is done by the lender in furtherance of such a use of the money, a recovery therefor cannot be had. Thus, the mere knowledge of the lender that the borrower of money intends to gamble with it, if by the terms of the agreement the latter is left free to use it as he pleases, may not constitute a bar to a recovery of it. But it is well settled that if the money is lent for the express purpose of enabling the borrower to gamble with it, a recovery cannot be had. *Cannan v. Bryce*, 3 Barn. & Ald., 179; *McKinnell v. Robinson*, 3 M. & W., 434; *Tracy v. Talmage*, 14 N. Y., 162. As already stated, there is no claim in this case for money lent. And the evidence would not support such a claim if there was one. The money was never for a moment in the possession of the bank. Never, for a moment, did the bank possess either the right or the power to use the money as it pleased. The agreement was that the Franklin Company should pay for the stock for which the trustees of the bank had subscribed, and take the stock and hold it as security. We thus see that by the very terms of the agreement the money was to be applied to a specific purpose, and that purpose an illegal one.

We use the word "illegal" not in the sense of *malum in se*, nor *malum prohibitum*, but in the sense in which it is used to describe the unauthorized acts of corporations—acts and contracts *ultra vires*.

"The contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. * * * * Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object—as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction—yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void." SELDEN, J., in *Bissell v. Railroad Companies*, 22 N. Y., 258, 285.

"Any application of, or dealing with, the capital or any funds or money of the company which may come under the control or management of the directors or governing body

of the company, in any manner not distinctly authorized by the act of Parliament, is, in my opinion, an illegal application or dealing." Lord LANGDALE, in *Salomons v. Laing*, 12 Beavan, 339.

These extracts are to show the sense in which the word "illegal" is used when employed to describe the unauthorized acts and contracts of corporations. And, with respect to such acts and contracts, it has been very aptly said that the powers and franchises of corporations are grants from the government; that it would be just as reasonable and just as legal to allow one who has a patent for one hundred acres of land to take possession of two hundred acres as to allow a corporation to usurp and exercise a power not conveyed to it in its charter.

III. Another ground on which the Franklin company claims to recover is, that when a contract has been executed, in whole or in part, and the corporation has thereby received a benefit, a recovery may be had by the other contracting party to the extent of the benefit thus conferred, notwithstanding the contract was *ultra vires*. It is a sufficient answer to this argument to say that the case fails to show that the savings bank has been thus benefited. The $50,000 paid by the Franklin company was paid directly to the Continental Mills. Not a cent of it ever came into the possession of the savings bank. The stock for which the $50,000 was paid was issued directly to the Franklin company. The title never for a moment vested in the savings bank. Although, by the terms of the agreement, the Franklin company was to hold the stock as collateral security merely, still the agreement, being *ultra vires*, cannot be enforced. Nothing possessing the slightest intrinsic value, not even a right of action, was ever secured to or vested in the savings bank. There is absolutely nothing on which a *quantum meruit* or a *quantum valebat* claim can be sustained.

DECISION OF THE COMMISSIONERS AFFIRMED.

CLAIM OF THE FRANKLIN COMPANY DISALLOWED.

APPLETON, C. J., BARROWS, VIRGIN, PETERS and LIBBEY, JJ., *concurred*.

ULTRA VIRES NOT APPLICABLE IN CASE OF NOTE SECURED BY DEED OF TRUST, EXECUTED FOR MONEY LOANED BY A NATIONAL BANK—INJUNCTION REFUSED.

FIFTH SELECTED CASE.

National Bank v. Matthews.*

A executed a promissory note to B, and to secure the payment thereof a deed of trust of lands, which was in effect a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B, who thereupon assigned them to the bank. The note not having been paid at its maturity the trustee was, pursuant to the power, proceeding to sell the lands, when A filed his bill to enjoin the sale, upon the ground that, by Sects. 5136 and 5137, of the Revised Statutes, the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. *Held*, that the bank is entitled to enforce the collection of the note by a sale of the lands.

Error to the Supreme Court of the State of Missouri.

On the 10th of March, 1871, Hugh B. Logan and Elizabeth A. Matthews executed and delivered to Sterling Price & Co. their joint and several promissory notes for the sum of $15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent per annum. The payment of the note was secured by a deed of trust, executed by her, of certain real estate therein described, situate in the State of Missouri.

On the thirteenth of the same month the note and deed of trust were assigned to the Union National Bank of St. Louis. Price & Co. failed to pay the loan at maturity. The bank directed the trustee named in the deed of trust to sell. Said Elizabeth thereupon filed this bill in the proper State court to enjoin the sale. The bank in its answer avers that it "accepted the said note and deed of trust as security for the sum of $15,000, then and there advanced and loaned to said Sterling Price & Co. * * on the security of said note and deed of trust."

*Reported in 96 U. S., 621 (1878).

A perpetual injunction was decreed upon the ground that the loan by the bank to Price & Co. was made upon real estate security; that it was forbidden by law; and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side. The bank removed the cause to the Supreme Court of the State, where the decree was affirmed. The bank then sued out this writ of error.

Mr. *Philip Philips* for the plaintiff in error.

This case does not fall within the limitations imposed by Rev. Stat., Sec. 5137. No mortgage or conveyance of real estate was made *to* the bank. Price & Co. had only a lien which could be enforced in default of payment. This was all that they passed to the bank (*Potter v. McDowell*, 43 Mo., 93; *Watson v. Hawkins*, 60 Id., 550), and it was a mere incident to the note, securing its payment to the holder thereof in good faith, although he was ignorant at the time of taking it of the existence of the lien. Had the mortgage not been delivered nor anything said about it the bank, on failure of the maker to pay the note, would have been entitled to the lien (*Green v. Hart*, 1 Johns, N. Y., 590; *Chappel v. Allen*, 38 Mo., 213), and its right to assert it could not have been successfully resisted on the ground that to permit it to do so would authorize a violation of its charter.

The act, by authorizing loans to be made "on personal security," cannot be held as limiting the transaction to the personal undertaking of the parties to the note; and it would not be violated if the bank should require as collateral a deposit of bonds or of stocks, either of States, municipalities or incorporated companies. *Shoemaker v. National Bank*, 2 Abb. (U. S.), 416; Schouler, Personal Property, pp. 87, 94; *Pittsburgh Car Works v. Bank*, Thompson's Nat. Bank Cases, 315. In many of these instances the bonds or stocks are secured by real estate. This, however, does not change the character of the collateral, or make it other than personal security. See, also, *First National Bank of Fort Dodge v. Haire*, 36 Iowa, 443; *Merchants' National Bank v. Mears*, Thompson's National Bank Cases, 353.

The decision of the learned court below questions neither the right of the bank to recover the contents of the note by suing the parties thereto, nor the validity of the lien created by the mortgage. Here there is a *bona fide* subsisting debt, evidenced by the note, whereof the bank is the lawful holder, and a lien which Price & Co., before their attempted transfer of it, could have made available. It does not now inure to their benefit, because they have assigned the note, and it cannot be enforced by the bank, as it was made void in its hands. Is the lien, then, vacated? It certainly is for all practical purposes, if the extraordinary position taken below should be sustained here.

Can the defendant in error, by a strained construction, be permitted to make the objection and cancel a contract which the statute does not declare to be void? There is some contrariety of opinion upon this question, and the court is referred to some of the numerous cases which answer it in the negative. *Smith v. Sheely*, 12 Wall., 360; *Gold Mining Company v. National Bank*, 96 U. S., 640; *Silver Lake Bank v. North*, 4 Johns (N. Y.) Ch., 370.

The decision in the last case is, that if the bank had passed "the exact line of its power, it would rather belong to the government to exact a forfeiture of the charter, than the court in this collateral way to decide a question of mis-user by setting aside a just and *bona fide* contract." The same doctrine is repeated in *Steam Navigation Company v. Wood*, 17 Barb. (N. Y.), 380, and supported by the judgments of the courts of Massachusetts, Pennsylvania, and other States. Ang. & A., Corp., section 153.

Mr. J. A. Hunter, *Mr. John W. Noble*, and *Mr. John C. Orrick*, for the defendant in error.

The deed of trust is in effect a mortgage, with a power of sale thereto annexed. Although a third person may be named as trustee, and vested with that power, the grantor has an equity of redemption which may be judicially foreclosed and sold. The *cestui que trust* has a beneficial interest in the lands. *Kennett v. Plummer*, 28 Mo., 142; *Chappell v. Allen*, 38 Id., 213; *Potter v. Stevens*, 40 Id., 229. In the ab-

sence of any statutory prohibition, the assignments would have vested that interest in the bank, but as the latter is permitted (Revised Statute, section 5137), to "purchase" or "hold" real estate in certain specified cases, of which this is not one, and in "no other," the assignments passed no interest in the lands, and conferred no right to subject them to sale to pay the note.

The words "purchase" and "hold," where they occur in that section, are not confined to cases where the absolute title to the fee has been conveyed. The provision allowing the bank to take a mortgage, by way of security for debts *previously contracted*, would be superfluous, if the general prohibitory words did not forbid it to purchase such an interest in real property as a mortgage transfers.

Looking at the mischief, which the statute had in view, it is immaterial whether the mortgage is made direcly *to* the bank, or is assigned to it. The interest acquired is, in each case, the same.

The preceding section allows the bank to loan money on personal security. This virtually prohibits loaning it on any other. *Expressio unius est exclusio alterius.*

The decided cases, without a dissent, affirm that all grants of corporate power are to be construed favorably to the public at large, and most strongly against the corporation; that it has only the powers expressly given or necessarily implied; that the specification of certain powers prohibits by implication the exercise of other substantive powers, and that the intention of the law-maker is to be gathered from the whole statute. Governed by these fundamental rules, it must be held that the transaction on the part of the bank was *ultra vires*, not allowed by, but in palpable violation of, the statute to which it owes its existence, and consequently void. The injunction was, therefore, properly awarded. *Fowler v. Scully*, 72 Pa. St., 456; *Kansas Valley National Bank v. Rowell*, 2 Dill., 371; *Ripley v. Harris*, 3 Biss, 190; *Commonwealth Bank v. Clark*, 4 Mo., 59; *Griffith v. Commonwealth Bank*, Id., 255; *Bank of Lawrence v. Young*, 37 Id., 398; *Downing v. Ringer*, 7 Id., 585; *White v. Franklin Bank*, 22 Pick. (Mass.), 181; *Brown v. Farkington*, 3 Wall., 381; *Beasley v. Big-*

nold, 5 Barn. & Ald., 335; *Forster v. Taylor*, Id., 887; *Cafre v. Rowlands*, 2 Mee. & W., 149.

Mr. Justice Swayne, after stating the facts, delivered the opinion of the court.

This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance.

Our attention has been called to but a single point which requires consideration, and that is, whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows:

"Section 5136." Every national banking association is authorized "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

"Sec. 5137. A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: *First*, such as may be necessary for its immediate accommodation in the transaction of its business. *Second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. *Third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. *Fourth*, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period that five years." Rev. Stat., 1999; 13 Stat., 99.

Here the bank never had any title, legal or equitable, to the

real estate in question. It may acquire a title by purchasing at a sale under the deed of trust; but that has not yet occurred, and never may.

Section 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view. Section 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage, would have been and was an incident to the note and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations, and to prevent the accumulation of large masses of such property in their hands to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances the doctrine of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor. We find nothing in the recording of the deed of trust which, in our judgment, brings it within the letter or meaning of the prohibitions relied upon by the counsel for the defendant in error.

In *The First National Bank of Ft. Dodge v. Haire and others* (36 Iowa, 443), the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real es-

tate, executed for that purpose, with a stipulation that in default of due payment of the note the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defense was set up as here. In disposing of this point the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, 4 J. C. R., 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage, with respect to a party entitled to the benefit of the security, and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris v. Runnells* (12 How., 79), this court said, that "the statute must be examined as a whole, to find out whether or not the maker meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase-money of slaves,

taken into Mississippi contrary to the statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worchester*, 7 Mass., 48; *Parton v. Hervey*, 1 Gray (Mass.), 119; *King v. Birmingham*, 8 Barn. & Cress., 29.

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *The Planters' Bank v. Sharp et al.*, 12 Miss., 75; *The Grand Gulf Bank v. Archer et al.*, 16 Id., 151; *Rock River Bank v. Sherwood*, 10 Wis., 230.

The charter of a savings institution requires that its funds should be "invested in, or loaned on, public stocks or private mortgages," etc. A loan was made and a note taken, secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. *Mott v. The United States Trust Co.*, 19 Barb. (N. Y.), 568.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.), 313; *Grundie v. Northampton Water Co.*, 7 Pa. St., 233; *Runyon v. Coster*, 14 Pet., 122; *The Bank v. Poitiaux*, 3 Rand. (Va.), 136; *McIndoe v. The City of St. Louis*, 10 Mo., 577. See, also, *Gold Mining Company v. National Bank*, 96 U. S., 640.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax's Devisee v. Hunters' Lessee*, 7 Cranch, 604.

In *Silver Lake Bank v. North*, 4 Johns. (N. Y.), Ch., 370, the bank was a Pennsylvania corporation, and had taken a

mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defense "that by the act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defense to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor KENT said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract. If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See, also, *Baird v. The Bank of Washington*, 11 Serg. & R. (Pa.), 411.

Sedgwick (Stat. and Const. Constr., 73), says: "Where it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequible and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and

the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

That has already been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government.

The decree of the Supreme Court of Missouri will be reversed and the cause remanded with directions to dismiss the bill; and it is

So ODERED.

Mr. Justice MILLER, dissenting:

I am of opinion that the National Bankrupt Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.

The contract to pay the money and the collateral conveyance for security are separable contracts, and so far independent that one may stand and the other fall.

In the present case the money was loaned on the faith of a deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of the money, is valid against Mrs. Matthews personally. With this latter contract the State court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter, ought, in my opinion, to be affirmed.

NOTES.

Corporations may make or indorse commercial paper.—In *Bank of Genesee v. Patchen Bank*, 13 N. Y., 309 (1855), it was held that the cashier of a banking corporation was authorized to indorse commercial paper on its behalf, and if, with the intention of binding the corporation, he writes his name "A. B., *Cash.*," on the back of the paper, the holder is authorized to write the name of the corporation over the signature of the

cashier, with proper words to make the indorsement in form a contract, in the name and on behalf of the corporation. It was also held, that where a party advances money upon such paper, in good faith, and relying upon the paper as belonging to, and indorsed by, the banking corporation for its use and benefit, the bank will be liable to him thereon, although in fact, it was indorsed for the accommodation of a third party. This doctrine is analagous to that applicable to partnerships in similar cases. For instance: If one of the partners of a mercantile firm affixes the partnership name to paper in which the firm has no interest, and such paper is negotiated, to an innocent holder for a valuable consideration, the firm is bound by the act of the copartner. *Gansevoort v. Williams*, 14 Wend., 133; *Catskill Bank v. Stall*, 15 Id., 364; *Evans v. Wills*, 22 Id., 324, per WALWORTH, Ch'r. This is on the principle that as a copartner has authority to execute such instruments in the name of the partnership, and if they are thus executed for an unauthorized purpose they will be held good in the hands of a *bona fide* holder. So, undoubtedly, he would have authority to indorse bills or notes in the firm name. In the case of the *Bank of Genesee v. Patchen Bank*, the defendant, as a banking association, had a general right to negotiate notes and bills held by it, and get the same discounted; but it had no right to indorse and to procure to be discounted notes and bills belonging to any other corporation or individual, when it had no interest in the subject. The evidence tended to show that the bill in question was drawn, accepted, and indorsed for the accommodation of a railroad corporation, and to enable that corporation to borrow money. The indorsement of the defendant would, therefore, be void in the hands of every person having notice of the facts. But if the proper officers of the defendant having negotiated it to the plaintiff, representing it to be a bill belonging to their bank, the plaintiff having in the usual course of its business discounted it, advancing to the defendant the proceeds, it was held that the defendant was precluded from setting up that it was indorsed without authority. It has further been held, in analogous cases, that if a note, made for the purpose of raising money, is negotiated upon a discount greater than the legal rate of interest, on a representation by the indorser that it is business paper in his hands, he cannot set up the defense of usury against the indorsee. *Holmes v. Williams*, 10 Paige, 326; *Dowe v. Schutt*, 2 Denio, 621; *Truscott v. Davis*, 4 Barb., 495.

In the foregoing case DENIO, J., observes: "I see no objection to applying to it the principle that where a party has, by his declaration or conduct, induced another to act in a particular manner, he will not afterward be permitted to deny the truth of his admission, if the consequence would be to work an injury to such other person." *Dezell v. Odell*, 3 Hill, 215.

The same doctrine is maintained in *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y., 125; *Bank of Genesee v. Patchen Bank*, 19 Id., 312; *Olcott v. Tioga R. Co.*, 27 Id., 546; *Bank of New York v. Muskingum Branch Bank*, 29 Id., 619; *Banking Association v. White Lead Co.*, 35 Id., 505.

And, in *The Exchange Bank v. Monteath*, 26 N. Y., 505, the court held that where a principal authorized an agent to draw and negotiate commercial paper for his use, and by a course of dealing in and recognition of such

paper, drawn for legitimate purposes, had accredited drafts having nothing on their face to discriminate them from such as the agent had the right to issue, he is responsible to a purchaser of such paper for value and without notice, though the paper was issued fraudulently for the accommodation of a third party. See, also, *Livingston v. Hastie*, 2 Caines, 246; *Lansing v. Irvine*, 2 Johns., 300; *Boyd v. Plumb*, 7 Wend., 309; *Gansevoort v. Williams*, 14 Id., 133; *Steele v. Catskill Bank*, 18 Id., 466; *Farmers' Bank v. Butchers' & Drovers' Bank*, 16 N. Y., 125; *The Bank of Bengal v. McLeod*, 7 Moore, P. C. Cas., 35; *The Bank of Bengal v. Fagan*, Id., 61; 1 Pars. on Notes & B. (Ed. 1863), 108.

"The doctrine frequently announced is, that where a corporation places a person in a position which implies responsibility, and thereby leads others to confide in his integrity, especially in matters pertaining to the office or agency, and peculiarly within the knowledge of the officer or agent, the corporation shall be responsible for any misrepresentation, negligence or fraud of such officer or agent whereby a party acting in good faith with such officer or agent has sustained a loss.

"This is sometimes placed upon the familiar maxim in equity that where one of two innocent persons must suffer by the acts of another, he who has enabled such person to occasion the loss must sustain the damage caused thereby. Or, in other words, he who without intentional fraud has enabled any person to do an act which must be injurious to himself or to another party, shall himself suffer the injury rather than the innocent party who has placed confidence in him." Field on Corp., § 193. See, also, *Narraganset Bank v. Atlantic Silk Co.*, 3 Met., 282; *Bird v. Daggett*, 98 Mass., 494; *Thompson v. Lambert*, 44 Iowa, 239.

So it has been held that corporations have the power to mortgage, unless restrained in that respect. *Aurora Agricultural Society v. Paddock*, 80 Ill., 263.

And a corporation prohibited by its charter from dealing in commercial paper, may receive and sell notes given in payment on the sale of its lands. *Ruckley v. Briggs*, 30 Mo., 452. So a railroad corporation may take and negotiate promissory notes in the ordinary course of business. *Frye v. Tucker*, 24 Ill., 180. See, also, *Hardy v. Merriweather*, 4 Ind., 203; *Lucas v. Pitney*, 3 Dutch. (N. J.), 221; *Moss v. Averill*, 10 N. Y., 449; *Richmond, etc., R. Co. v. Snead*, 19 Gratt. (Va.), 354.

It is difficult to reconcile these decisions relating to commercial paper with the broad and unqualified terms in which the doctrine of *ultra vires* was applied in some of the early English cases; and especially with the decision in the case of *Pearce v. Madison & Indianapolis R. Co. and Peru & Indianapolis R. Co.*, 21 How., 441.

Thomas v. Railroad Company, 101 U. S., 71—national banks.—The case of *Thomas v. Railroad Company*, one of the selected cases in the preceding chapter, is a very recent exposition of the law of *ultra vires* in its application to contracts in suits at law, and follows the early English cases in relation to the same subject. It may be observed, however, that in many of the recent cases which we have referred to the courts have, by construction, sustained the validity of many corporate contracts, as within the

incidental powers conferred and necessary to the proper execution of them, where, apparently, they were not within the scope of the corporate powers. In this way the validity of contracts to carry passengers and merchandise beyond the limits of routes fixed by the charter, has been sustained. See selected cases and notes, *post*, Ch. III. And in *Gold Mining Company v. National Bank*, 96 U. S., 640, it was recently held that a defendant who was sued by a national bank for moneys it loaned him, could not set up as a bar to the action that it exceeded one-fourth of its capital stock. The court says: "The first objection to the recovery arises from the amount of the debt. Plaintiff is a national bank, organized under the act of Congress of June 3, 1864, with a capital stock of $50,000 (13 Stat., 99). By the twenty-ninth section of the act it is provided as follows: 'The total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of the company, or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in.' Rev. Stat., Sec. 5200. After obtaining and holding to its own use the money, can the mining company be allowed to interpose the plea that the bank had no right to loan the money? In *Harris v. Runnels* (12 How., 79), where the defendant sued upon a note set up the illegality of its consideration, it was held that the whole statute then in question must be examined to discover whether it was intended to prevent courts of justice from enforcing contracts in relation to the act prohibiting, and that when a statute prohibits an act, or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. A statute provided that slaves should not be brought into a State without a previous certificate signed by two freeholders. Slaves were brought in without such certificate and sold, and the purchaser was held liable for the purchase-money. Mr. Justice WAYNE said that the rule was allowed not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy. In *O'Hare v. The Second National Bank of Titusville* (77 Pa. St., 96), the question was made upon the statute we are considering, and it was objected that the bank could not recover the amount of the loans in excess of the proportion specified. The court held that the section of the statute referred to was a rule for the government of the bank, and that the loan was not void. See, also, *Pangborn v. Westlake et al.*, 36 Iowa, 546; *Vining et al. v. Bricker*, 14 Ohio St., 331.

"We do not think that public policy requires, or that Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

Incidental powers—construction.—The opinion in this case, it seems to me, manifests a disposition of the courts to relieve parties from the hardships of the generally odious doctrine of *ultra vires*. The proper elements would seem to exist in this case, frequently held sufficient to warrant the application of the doctrine in suits at law on contract; viz., 1. A contract not within the scope of the powers granted, and even in violation of

the express provisions of the laws of its creation; and, 2. A presumed knowledge of both parties that the act was not within the chartered powers, or was in violation of those provisions. It is true the act provides that national banks may carry on the business of banking, "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining and circulating notes." (Rev. Stat., § 15136, Sub. 7.) But section 15137 provides in what cases they may purchase, hold and convey real estate, which, as we have seen, precludes them from taking a mortgage on real estate as security for money loaned; and section 5200, prohibits them from allowing any person, company, or corporation, to become liable to them for borrowed money in excess of one-third part of the capital stock of such bank actually paid in.

Now these matters are equally accessible to both the banks and borrowers. They are matters of public law, of which, as in other cases where the doctrine of *ultra vires* has been held to apply, both parties are bound to take notice. The act requires the association to file with the comptroller of the currency a certificate, showing among other things the amount of the capital stock. So that in the foregoing case the borrower had the means of knowing the amount of that as well as the bank; and he knew or might well be held to have known, on the principle of other cases, as well as the bank, that the loans were in excess of one tenth of the capital stock.

In the following very well considered case, where the same principle seemed to be involved, a different conclusion was reached.

In the case of *Lowler v. Scully*, 22 Pa. St., 456 (1873), the facts are sufficiently disclosed in the opinion of the court, to enable the reader to judge of the similarity of the question determined in the foregoing case. AGNEW, J., said: "The First National Bank of Pittsburgh, asked the district court to enforce by *scire facias* the payment of a mortgage for future advances. The defendant, the owner of the mortgaged land, asserts that the mortgage is forbidden by act of Congress, which confers upon the bank its charter and all its powers. The simple question is, is the mortgage valid or void; and if void will the law enforce it? In deciding this question we must be guided by the federal laws and federal precedents, for the subject is one of federal origin and federal control. The plaintiff is a corporation created and governed by the act of Congress, approved the 3d of June, 1864, commonly called the National Bank Act. What is the federal rule to be applied to such a corporation? In the *Bank of U. S. v. Dandridge*, 12 Wheaton, 64, Justice STORY lays down this rule: 'Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising them, upon the construction of the statute itself.' For this he cites the following language of Chief Justice MARSHALL, in *Head v. Prov. Ins. Co.*, 2 Cranch, 127, 'without ascribing to this body, which in its corporate capacity is a mere creature of the act to which it owes its existence, all of the qualities and disabilities annexed by the com-

mon law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act and to be capable of exerting its faculties only as in the act authorized.'

"These propositions are repeated by himself in *Dartmouth College v. Woodward*, 4 Wh., 636, and by TANEY, C. J., in *Bank of Augusta v. Earle*, 13 Pet., 587, and *Penrise v. Chesapeake & Delaware Canal Co.*, 9 How., 184. In our own State the same doctrine is recognized in the case of a national bank. Justice STRONG said: 'The bank is a creature of the act, dependent on it for all its powers, and *controlled by all the restrictions* which the act imposes.' *Venango National Bank v. Taylor*, 6 P. F. Smith (56 Pa, St.), 14.

"This being the settled rule of interpretation, the question is: 'Does the act of Congress authorize or permit a national bank to take a mortgage of lands to secure the payment of future loans and discounts?'

"The banking powers of these associations are to be found in the 8th section, and are "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on *personal security;* by obtaining, issuing and circulating notes, according to the provisions of the act.' In view of the rule of interpretation of such charters given to us by the federal courts, and the maxim *expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security, for, agreeably to this rule and maxim, no other security than personal can be taken for money lent. This is the law of the bank's capacity and of its control. * * *

"Another obvious purpose of confining their loans of money to personal security is to prevent these associations from splitting on the rock which has ruined so many banks; to-wit, that of lending too much of their capital to one person or firm. The 29th section provides: 'That the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth of the amount of the capital stock of such association actually paid in?'

"Thus Congress has prohibited an undue aggregation of its capital stock in single hands, even though each note or bill may be well secured by the names upon it. Then what must we say of large aggregations of capital in the hands of one man, without personal security, on the faith of an estimated value of real estate and the risk of title and conflicting liens? * * *

"Here the argument might rest, that the lending of money on mortgage or real estate security is *ultra vires* and forbidden. But Congress has left nothing to implication, and in the 28th section has said in what cases these banks may hold real estate, and has forbidden it in all others. The 28th section reads thus: 'That it shall be lawful for any such association to purchase, hold and convey real estate as follows: *First*, such as shall be necessary for its immediate accommodation in the transaction of its business. *Second*, such as shall be mortgaged to it in good faith by way of security for debt previously contracted. * * * Such association shall not purchase or hold real estate in any other case or for any other purpose than as speci-

fied in this section. * *' Thus the section speaks to the bank in plain language, you shall not purchase or hold real estate (besides your banking house) except in good faith to secure debts already contracted, and you shall not hold in mortmain for a longer period than five years that which you can legally take."

The judgment below for the plaintiff for $79,118.70 was reversed.

Remarks on the foregoing case.—It may be said that this case may be distinguished from the *Gold Mining Company v. National Bank, supra*, in this, that there is a positive provision of the statute that the banks shall not purchase, hold or convey real estate, except for the purposes designated, and that the taking of a mortgage of real estate for loans is not one of the purposes thus designated; whereas, the statute applicable to the former case only provides that "the total liabilities to any association of any person," etc., "shall at no time exceed one-tenth part of the capital stock of such association actually paid in." This evidently amounts to a prohibition. It is not declared in reference to the holding of real estate that the deed or mortgage thereof, made to the association in violation of the provisions of the statute, shall be void, yet the court so holds them. Nor in case of loans to persons in excess of one-tenth of the capital stock does the statute provide that the notes shall be void. And the court declares that they are not in the above case.

In the earlier cases, where the doctrine was applied in suits at law on contracts, both parties were held chargeable with notice of the *ultra vires* act, but the party seeking the enforcement of the contract against a corporation, was the party against whom the plea was made and who suffered the loss. In the last two cases, the plea was made by the other parties to the contracts and against the enforcement of them by the respective corporations. The principle has frequently been recognized that in case of *ultra vires* contracts, either party may interpose the plea as a defense. It has also been decided, as we shall hereafter notice, in many recent cases, that the doctrine has no application to executed contracts, or to contracts where the corporation has received the full benefit of the same; and where the other party cannot on a repudiation of it be placed in *status quo*. But this was so held where the corporation interposed the plea. The converse of the proposition ought to be equally good. That is, where the plea of *ultra vires* is interposed by a party contracting with a corporation, it ought not to prevail where the party thus interposing it has received the consideration of the contract, in whole or in part, from the corporation. The last two cases referred to might have rested upon this familiar and just principle, if on no other. The defendants had received the consideration and fruits of the contract to which the plea was interposed, and all the agreements adduced to sustain the contracts, when interposed by corporations in such cases, would be equally applicable to those above referred to. As to the doctrine in case of executed contracts on a plea of *ultra vires* by corporations, see *post*, Ch. IV.

It is apparent that the decisions on this subject cannot be reconciled; and the frequent hardships attendant upon the application of the technical and "odious" doctrine of *ultra vires*, united with the requirements of commer-

cial interests, have contributed to limit its application in this class of cases, and driven the courts to enlarge the incidental powers of corporations by a liberal construction of corporate powers conferred by the charter or general laws by or under which they were created.

National banks—powers of.—In *National Bank v. Wells*, 22 Hun., 51, the plaintiff agreed with one Burr to procure to be discounted for him a note, indorsed for Burr's accommodation by the defendant Wells, on plaintiff's receiving a commission of five per cent for so doing. The plaintiff indorsed the note and sent it to another national bank by which it was discounted. The note not being paid, was protested, and notice sent to the plaintiff, who subsequently took it up. The plaintiff sued on the note, and the defendants claimed as a defense and insisted on the trial, that the transaction was usurious, and that the plaintiff had no title to the note for the reason that it had no power to agree to sell its indorsement or procure the note to be discounted, on consideration of a commission; and that it had no power to take up the note, as that was equivalent to a purchase, which the plaintiff was not authorized to make. But it was decided that the transaction was not usurious; that the title to the note did not depend upon the alleged unlawful agreement to loan its credit and procure the discount; that its title was derived from the discounting bank; that it was a *bona fide* holder for value; and that the plaintiff must be held to be the lawful owner of the note. See, also, *Leach v. Hale*, 31 Iowa, 69.

On the contrary, it has been held that selling railroad bonds upon commission (*Weckler v. First National Bank*, 42 Md., 581); and the purchase of promissory notes by a national bank for the purpose of speculation (*First National Bank v. Pierson*, 24 Minn., 140); was *ultra vires* and void. See, also, *Wiley v. First National Bank of Brattleboro*, 47 Vt., 546; *Caldwell v. National Mohawk Valley Bank*, 64 Barb., 333; *Van Leuven v. The First National Bank*, 6 Lans., s. c., 54, N. Y., 671; *Fowler v. Scully*, 72 Pa. St., 456; *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y., 278; *Shinkle v. The First National Bank of Ripley*, 22 Ohio, 516; *The First National Bank v. National Exchange Bank*, 39 Md., 610.

But the fact that the purchase of a note by a national bank from an indorsee is *ultra vires*, does not prevent the bank from maintaining an action thereon in its own name against a prior party thereto. *National Pemberton Bank v. Porter*, 125 Mass., 333.

Where a mortgage is given to secure a loan to a national bank.—A mortgage given to an officer of a national bank, at the time of a loan by the bank, to secure the payment of the loan, is in effect made to the bank, and is *ultra vires* and void. *Fridley v. Bowen*, 87 Ills., 151.

But national banks may take an assignment of notes secured by a trust deed on real estate, as collateral security for a pre-existing debt due them. *Worcester National Bank v. Cheeney*, 87 Ills., 602; *Mapes v. Scott*, 88 Id., 352.

And the authority to purchase real estate to secure debts provided for by the national banking law, gives the power to purchase real estate for that purpose, though in excess of the debt. *Upton v. National Bank*, 12 Mass., 153. And such banks may purchase notes and bills of third persons,

owned by and available by one dealing with the bank, and they are not confined to discounting one's own paper. *Smith v. Exchange Bank*, 26 Ohio St., 141.

National banks—no power to traffic in commercial paper.—In *National Bank v. Pierson*, 24 Minn., 140, the question presented was, whether under act of Congress relating to banking, a national bank had the power to traffic in promissory notes as a species of personal property, or to acquire any title to such paper, not obtained by way of discount, or by the lending of money on the credit of it. It was held that it had no such authority.

The court observed: "In the case of *Farmers' and Mechanics' Bank v. Baldwin*, 23 Minn., 198, it was expressly held, that no power of this character is conferred by a law of this State, which authorizes State banks organized under its provisions, 'to carry on the business of banking by discounting bills, notes, and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange, by loaning money on real and personal securities, and by exercising such incidental powers as may be necessary to carry on such business,' and that a purchase of such paper, made not in the way of discount, was *ultra vires*, as outside the legitimate scope and purposes of such institutions.

Under the congressional enactment the authority which is given is "to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of said title." U. S. Rev. Stat., § 5136.

This is substantially the state statute which was under consideration in *Farmers' and Mechanics' Bank v. Baldwin, supra*. The word "negotiating," as used in this section, and likewise in section 29 of the same statute is used in its ordinary and appropriate and transitive sense to indicate, not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the holder or owner, and put into circulation. Hence, the incidental power to negotiate notes to the extent necessary to carry on the business of banking simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling, and transferring it by means of a re-discount obtained or otherwise. It gives no implied authority to speculate or traffic in paper of the character of the note in question, or in financial securities of any description. Morse on Banking, 4 and 5. The powers, therefore, which are conferred by this section, in respect to the acquisition of commercial business paper, are in no way affected or enlarged by the use of the term 'negotiating.' In the absence of any authoritative exposition of the federal statute in this regard, the principle settled in the *Farmers' and Mechanics' Bank v. Baldwin* must be regarded as decisive of the present case."

The general rule of corporate liability is that if the corporation has authority to make or indorse a note, or execute a bond or mortgage for any purpose, it is liable on these instruments in the hands of a *bona fide* holder,

although they may have been made and used for a purpose not authorized by its charter. And the same doctrine applies to a municipal corporation. See *post*, Ch. XI.

The doctrine of the law merchant applied to corporate bonds.—That the principles of the law merchant have moulded the opinions and influenced the judgments of our courts, with reference to the application of the doctrine of *ultra vires* to ordinary commercial paper, will be manifest from the foregoing selected cases. They have gone still further, and influenced by public policy and commercial convenience, if not necessity, have given to corporate bonds and coupons, payable to bearer, the qualities of commercial paper, and applied the principles of the law merchant to them. They have come to be regarded by the almost uniform decisions of the courts as having the properties and qualities of negotiable instruments, and as securing to the *bona fide* holder for value all the rights and privileges of a holder of negotiable paper by the law merchant.

In *Morris Canal and Banking Company v. Fisher*, 1 Stock. (9 N. J. Eq.), 667, the court say: "The manner in which these bonds are engraved, the coupons making the interest payable half-yearly to the bearer of them, and all the evidence before us conspire to show that the company which issued them, and which now disputes the title of the holder upon the ground that they put them into the hands of the seller for a special purpose, which did not authorize him to dispose of them as he did, really intended them to circulate, as in fact they do. This design is, indeed, quite as apparent as if it was engraved on their face in express words. The objection now made, that the legal character of the instrument adopted is such as to frustrate this design, certainly comes with a bad grace from the party which put them in circulation. Even as between third parties, we suppose the common usage to transfer would justify us in holding these securities to differ from common obligations in being so far negotiable that the *bona fide* possessor shall be held to have a good title. But the case is still stronger against the party which made and issued them. To permit such parties to dispute this result of the usage would be to permit them to take advantage of their own wrong. And besides the obvious interest of the companies is that these bonds should be salable, free from all questions of equity. They are generally issued for the express purpose of raising money by their sale. To declare them subject to the equities existing in the case of ordinary bonds upon every transfer of them would be to strike a blow at the credit of the great mass of these securities now in the market, the consequences of which it would be impossible to predict." See, also, the English cases, *Gorgier v. Mieville*, 3 B. & C., 45; *Long v. Smith*, 7 Bing., 284, and in the following American cases: *Miller v. Rutland, etc., R. Co.*, 40 Vt., 399; *Chapin v. Vermont, etc., R. Co.*, 8 Gray, 577; *Haven v. Grand Junction R. Co.*, 109 Mass., 88; *National Exchange Bank v. H. P., etc., R. Co.*, 8 R. I., 375.

These general principles have also been recently held to apply to the similar bonds and coupons of municipal corporations. See *post*, Ch. XI, and authorities cited.

CHAPTER III.

APPLICATION OF THE DOCTRINE TO THE CONTRACTS AND TORTS OF CORPORATE CARRIERS BEYOND THEIR CORPORATE LINES.

SIXTH SELECTED CASE.

HOOD v. THE NEW YORK AND NEW HAVEN RAILROAD COMPANY.*

The agent of the defendants, who were a railroad corporation running their cars from N. H. to P., sold the plaintiff a ticket for the fair from N. H. to C., which was five miles beyond P.

The plaintiff, for injuries which he received in a stage running between P. and C., brought his action upon a special contract to carry him safely by railroad and stage from N. H. to C.

For more than six months before, and at the time of such sale, the defendants, through their agents, had been and were in the daily usage of entering into and fulfilling contracts identically like that alleged in the declaration, and during said entire period had permitted their agents publicly to represent them as vested with the powers requisite for such a purpose. The plaintiff, knowing such representations and believing them to be true, was thereby induced to enter into and pay the consideration of said contract, which otherwise he would not have done. But the defendants had not the power, under their charter, to enter into the alleged contract, and had never by any corporate vote expressly authorized or sanctioned the same, nor had their directors by any vote directed any such contract to be made.

Held, That the defendants were not estopped to claim that under their charter they had no power to enter into the alleged contract, and that it was not obligatory upon them.

* Reported in 22 Conn., 502 (1853).

A NEW trial having been granted by this court in the case of *Hood v. The New York & New Haven Railroad Company*, the cause came on again for trial before the jury at the term of the Superior Court for New Haven county, holden in January, 1853.

Upon the trial to the jury, the plaintiff introduced in evidence the charter of the defendants and the charter of the New Haven & Northampton Company, a railroad corporation incorporated by the legislature of this State for the purpose of constructing a railroad from the city of New Haven to the village of Plaineville, in the town of Farmington, and of extending the same thence northerly to the north line of the State; also a lease from the latter company of their entire road to the defendants.

The plaintiff offered evidence to prove and claimed that he had proved the contract as set out in his declaration.*

The plaintiff offered evidence to prove and claimed that he had proved the contract as set forth in his declaration.

The defendants denied ever having made such contract, and further claimed that if such contract were proved it was not

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*The substance of the declaration, as reported in this case, in the same volume, page 1, is as follows: "This was an action founded on a special contract of the defendants to carry the plaintiff safely by means of railroad cars and stages from the town of New Haven to the village of Collinsville."

The declaration, after stating the undertaking of the defendants, alleged that on the 15th day of January, 1850, while the plaintiff was a passenger to be conveyed by the defendants upon the route from New Haven to Collinsville, it became and was the duty of the defendants to use proper care in safely and securely conveying the plaintiff by means of said cars and stages from New Haven to Collinsville; yet the defendants, not regarding their undertaking, did not use proper care, but before the plaintiff had arrived at the terminus of said route in Collinsville; viz., at Farmington, they negligently, carelessly and unskillfully caused him to be placed in a certain sleigh, or carriage upon runners, for the purpose of conveying him over the remaining part of said route; and through the carelessness, negligence and unskillfulness of the defendants and their servants and agents said sleigh, or carriage upon runners, was upset and thrown upon its side, by means whereof the plaintiff, being therein, was severely and dangerously wounded, bruised and injured, and one of his legs was crushed and the bones thereof were broken in divers places, and its arteries ruptured, and by means of the premises the plaintiff became and was lame and disordered, and so continued for a long space of time," etc.

obligatory upon them for the reason that, under their charter, they had no power to enter into any such contract, and prayed the court to so instruct the jury. "The court, upon this subject, did inform the jury that the defendants had not, under their charter, the power to enter into any such contract, and that the same, if proved, would not be obligatory upon them unless they were estopped from denying their power, as claimed by the plaintiff."

The plaintiff also offered evidence to prove, and claimed that he had proved, that the defendants, from the time of their taking possession of the canal road, under the aforesaid lease, and for a period of more than six months anterior to the making of the alleged contract with him, had been and were in the daily usage of entering into and fulfilling contracts identically like that alleged in the declaration; that during that entire period they had publicly represented and held themselves out to the community through their duly authorized agents as vested with powers requisite to enter into and fulfill such contracts, and during that entire period had knowingly permitted their agents to represent the said company as vested with the aforesaid powers; that the plaintiff, knowing of such representations, and believing them to be true, and being ignorant of the corporate powers of the defendants, was thereby induced to enter into said contract and pay the defendants therefor the consideration demanded by them, which should not have been done had he not known of such representations and believed them to be true. The plaintiff thereupon claimed that if the jury should find the facts to be as claimed by him the defendants were estopped from denying the obligation of said contract, and requested the court to so instruct the jury.

The defendant denied that the facts were as claimed by plaintiff and introduced evidence to disprove the same.

The evidence in support of the plaintiff's claim consists of certain acts and declarations of the agents of the defendants in issuing and selling tickets and making contracts for the transportation of passengers similar to the one claimed to have been made with the plaintiffs, and in receiving and paying over to the proper officers of the company the moneys received from the sale of such tickets, and the transportation of such

passengers, and the continuance of such acts, for so long a time and in a manner so public and notorious that, as the plaintiff claimed, they must have been known to the directors and stockholders of the company; and that, after such acts had become so known, the said agents were suffered to continue them without objection from any one.

But there was no evidence that the defendants, by any corporate vote, had ever expressly authorized or sanctioned the making of any such contract as the plaintiff claimed had been made with him. Nor was there any evidence that the directors of said company had, by any express vote or order, directed any such contract to be made. But it was proved and not denied that they had appointed the proper officers and agents of said company, and without giving them any particular instructions upon the subject, had permitted them, without objection on their part, to make the declarations and perform the acts aforesaid.

The defendants thereupon claimed that even if the jury should find the facts to be as claimed by the plaintiff, they were not estopped from denying the obligation of said contract, because they could not, in any manner, be estopped from denying the validity of the contract, which, by the terms of their charter, they had no power to make. And they further claimed that they could not be estopped by any acts, declarations or contracts made by any of their officers or agents, which they did not expressly authorize to be made, and which, by their charter, neither the company nor their officers, or agents, were authorized to make, and prayed the court so to instruct the jury. The court did not instruct the jury in the manner claimed by the defendants, but charged them in conformity with the claim of the plaintiff.

The jury having returned their verdict in favor of the plaintiff the defendants moved for a new trial, claiming that the court erred in omitting the charge to the jury as requested by them, and the questions thereon arising were preserved for the consideration and advice of the court.

Ellsworth, J.—This case was before the court at its last session, when we granted a new trial for a verdict against evi-

dence. The question now presented was not then adjudicated, though it was alluded to in the arguments of counsel, and in the opinion of the court, as one of great importance. There was another ground for granting the new trial, entirely satisfactory to the majority of the judges, and this was passed by. It is now distinctly presented for our judgment, and is the only question on the record.

After the fullest consideration, with the aid derived from the learned and able arguments at the bar, a majority of the court do not hesitate to hold, there must be a new trial. It will be noticed that the suit is upon a special promise of the defendants to carry the plaintiff from New Haven to Collinsville; not an action against common carriers for an injury suffered while passing over their road, nor as founded upon a responsibility growing out of such relations. This would not answer—for the defendants could not be common carriers, except on their own road; so the pleader declares upon a special undertaking of the defendants, aside from their appropriate line of duty, and the attempt is to subject them on that undertaking and on nothing else.

It is found that the defendants had no power to enter into the undertaking in question, and therefore as ground of claim, it must be agreed the undertaking merely is of no avail, for the reason that the directors, having no authority, did not in legal estimation make the contract for the company. The question is, are the defendants estopped setting up this in their defense? The statement of the case carries on its very face conviction to the mind that it cannot be so. The defendants estopped from denying that they have done what they never could have done! It is a question of power under the charter; and however individuals may be liable and estopped, who untruly hold themselves out as clothed with power, the defendants cannot be estopped on any such principle of law known to the court. The notion of an estoppel *in pais*, to which class, if any, this estoppel belongs, proceeds on the idea of acquiescence or consent; a consent expressly or impliedly given by the party claimed to be estopped. Of course, there must be a legal possibility, or there can be no real or supposed acquiescence and consent, and where consent may be given

silence may be sufficient proof that it is given; and so, a course of known action may be sufficient proof, for the law requires no exact form. But as we say, it does require a legal possibility, and where there is none, courts cannot consistently hold there is an estoppel. The case of *Buckley v. The Derby Fishing Company*, 2 Conn. R., 252, and that class of cases, which abound in the books, is a good illustration of the distinction above alluded to. If a corporation has the power to do a thing, and is in the habit of doing it in a particular way, it may bind itself to third persons, though it do not pursue the exact mode prescribed in the charter; for the mode is not exclusive but concurrent. So, too, where a provision in a charter is designed to protect the corporation, the corporation may waive this provision, and this may be proved to be done by a repetition of acts of a like or similar character. But the question here is, as we have said, one of power, not of form.

The plaintiff introduced circumstantial evidence on the trial to prove that the directors of the company made the contract, and particularly, that their subordinate agents had for some months previously been in the practice of contracting with other persons, as they did with the plaintiff. Suppose this is true, and that the knowledge and consent of the directors may be properly inferred from this continued practice of the directors; this will not place the plaintiff's case, in our judgment, on any higher ground than if the directors had, by a formal vote, contracted with the plaintiff to carry him to Collinsville. It being a question of power, silent acquiescence in the acts of subordinate agents does not make a stronger case; for, if a formal contract is not obligatory on the company, one proved by inferior or circumstantial evidence certainly is not. The kind of evidence is quite immaterial. Should the directors of a savings bank, or of any bank, contract with a ship builder for a steam ship to navigate the ocean, would this contract bind the company? Certainly not; because the directors have no power to make it; nor would they have more were they to make such contracts from day to day. The legislature has absolutely marked the limit of this power, and they cannot exceed it under the charter; and if the

directors, even with all the stockholders at their side, transcend the limits of the charter, and make contracts foreign to their business, they only act for themselves. The reason is, there can be no consent of the corporation. The consent of individual stockholders however repeated, is not their consent, nor is it admissible proof to establish consent; so that, if it were true, every stockholder had expressed his consent, it would make no difference in the case. If this is not so, there are no restrictions or limitations on chartered companies, and they may do anything the directors please, which is not absolutely unlawful. The exercise of power is held to prove itself, which is absurd.

No one would say that the first contract made by directors to carry to Collinsville, or Litchfield, or New Hartford, or Northampton, would be obligatory on the company; yet it must be so if stockholders are, of course, bound by every contract of their directors. Were the charter a public one, it is agreed the company would not be bound by such acts, however repeated; but in truth a private charter is not essentially different from a public one, in this respect; for the plaintiff must have known that the defendants were incorporated by the legislature for the purpose of making or using only a railroad. Their very name, as well as the location and business of their road, is sufficient notice that they are not incorporated for running stages throughout the State; and no person can assume or suppose the defendants are to go beyond the appropriate business of a railroad. The idea of an imposition on the public, as to these stages running off from the road to and from Litchfield and other places, as the defendants' stages, is incredible and preposterous. The public know where the charter may be seen, and what it contains.

Many cases were read on the argument to prove that a corporation is considered for civil purposes as a person, and subject to the same rules of law. We do not question this, but we do not see how it helps the plaintiff's case. They hold that a principal that *can* give authority, whether a corporation or a person, may, when one assumes to act for him, and he does not object to it, be estopped denying his agency; but an infant is never estopped, nor a married woman, nor ought a

body of stockholders to be, united so as they are under a specific charter, especially when the directors have disregarded it, and assumed to act according to their own pleasure. Could the company by legal possibility do the act it would be otherwise.

But, it is said, the jury have found that the stockholders, in fact, gave their consent, and it may not now be denied. We have already shown this can make no difference; but we say further that this notion of their consent is altogether untenable and unjust. We know, certainly, the stockholders did not, all of them, give their consent. Some were minors, married women, executors and administrators, trustees, officers of the law in possession, and some were, at the time, out of the country. So the body of stockholders was changing from day to day. Now, to hold that the entire body of stockholders gave their consent to the contract in question, and that therefore it is good, is absurd and puerile. But suppose they did; this was not a corporate act, and has, therefore, no corporate character. We repeat that the directors and stockholders have no corporate powers or relations, and can give no consent, but what is within the appropriate business of the charter.

Again, it is said, the defendants ought not to be permitted to call in question the acts of their agents. Why not, as much as other principals, whose agents transcend their authority, and abuse their tust? If it is replied the directors have suffered this course of things for months, when they could have arrested it at once, we ask, whose agents they were? Certainly not of the innocent stockholders'. The directors represent them only while they act within the scope of the charter; the charter is the measure of their power; and sad would it be if directors could trample upon this, and yet bind the stockholders as firmly as if they were acting within it. If the directors have done wrong let them suffer the consequences.

We have not thought it necessary to comment particularly on the numerous authorities cited at the bar on the several points made, for we find nothing in any of them inconsistent with the views expressed.

Gill & Johnson is in direct accordance with what we have said. We place our judgment upon a plain principal of equity

and law; viz., that these defendants are not bound by a contract they had no power to make, and are not estopped setting up this matter in defense. We advise a new trial.

In this opinion, CHURCH, C. J., and STORRS, J., concurred. WAITE, J., having tried the cause in the court below, was disqualified, and HINMAN, J., dissented.

NEW TRIAL GRANTED.

NOTES.

Liability of railroad corporations on contracts to carry beyond the terminii of their roads—more liberal views.—The foregoing case is an authority for the extreme doctrine of *ultra vires* in its application to the contracts of railroad corporations to carry passengers, etc., to a point beyond the terminii, or aside from the line of their respective routes, as provided by their charters; holding that such contracts are *ultra vires* and void. See, also, *Converse v. Norwich & New York Trans. Co.*, 33 Conn., 166. In the latter case BUTLER, J., referring to the case of *Hood v. New York & New Haven Railroad Company*, observes: "The plaintiffs insist that the case is in conflict with the whole current of authority, both in England and in this country, and is not law. That case cannot be overruled or shaken on the ground that the principles there applied are technically wrong. The principle is fundamental and elementary, that the power of a corporation is limited to the powers conferred by the charter, and such as are necessarily incidental thereto. The courts of other States, in the cases cited, have not questioned or disregarded that principle. But corporations, within a few years, under general laws, have become so numerous, and are so connected with, and so control the business of the country, and even its religious and benevolent agencies, that courts have gradually come to think it necessary to relax the technical and theoretical strictness of the legal principles applicable to them, and subject them to the same liabilities for the acts of their agents as natural persons, so far as it can be done, practically and consistently with their charters. The very rapid increase of these corporations, which now monopolize the business of land carriage and a large share of that which is done by water, and the equally rapid increase in the quantity of freight which they carry destined to points beyond their chartered termination, render it desirable for them and the business community that they should have power to make business connections and contracts with each other, and assume a joint responsibility for carriage beyond the termination of their routes; and the tendency of the courts is almost universally to recognize their power so to do, where the purpose is auxiliary, beneficial, and within a reasonable limit as an intended or necessary incidental power, by a liberal construction of the legislative grants. Whether we ought so to regard the changes and follow the prevailing decisions and relax the strict-

ness of the rule by such liberal construction in respect to the intention of the legislature or the necessity for such an incidental power, either because it is wise to do so, or for the sake of uniformity, or whether we should hold to the maxim of *stare decisis* and adhere to the old and strict rule of construction adopted in the case relied upon, it is not necessary now to determine." See, also, *Elmore v. Naugatuck R. Co.*, 23 Conn., 457.

Current of authorities adverse to the foregoing case.—The suggestions of the court in the case last quoted from indicate the necessity of a change. In this way and for such reasons our jurisprudence has grown and improved, and the current of modern decisions is adverse to the doctrines of the courts in Connecticut on this question.

The prevailing doctrine is that a railroad company possessing the ordinary powers given to corporations generally is subject to liability the same as an ordinary common carrier and may, as such common carrier, subject itself to the obligations and liabilities of a carrier beyond its own line. *Railroad Company v. Party*, 22 Wall., 123; *Bissel v. Michigan R. Co.*, 22 N. Y., 258; *Beffet v. Troy & Boston R. Co.*, 40 Id., 168; *Root v. Great Western R. Co.*, 45 Id., 524; *Burtis v. Buffalo, etc., R. Co.*, 4 Id., 269; *Hill Man. Co. v. Boston, etc., R. Co.*, 104 Mass., 122; *Feital v. Middlesex R. Co.*, 209 Id., 398; *Noyes v. Rutland & B. R. Co.*, 27 Vt., 110; *Morse v. Brainard*, 41 Id., 550; *Railroad Co. v. Transportation Co.*, 16 Wall., 324. The only questions now open to controversy in these cases are those relating to the character of the agreement and the weight, force and competency of the evidence to establish it. *Id.*

In *Noyes v. Rutland & Burlington R. Co.*, *supra*, REDFIELD, C. J., says: "It seems now well settled that railroad companies as common carriers may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers in no sense under their control. * * * It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract bind themselves to deliver parcels and merchandise beyond the strict limits of their line in town and country, and in such cases could only exonerate themselves by a personal delivery." See, also, *Jordan v. Fall River R. Co.*, 5 Cush., 69; *Weed v. Saratoga & Schenectady R. Co.*, 19 Wend., 534; *Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt., 186.

To the same effect is the English case *Muschamp v. Lancaster & Preston Junction R. Co.*, 8 M. & W., 421 (1841), where a parcel was received by the defendants directed to a point beyond the terminus of the road, and they were held liable for its loss.

The argument of the learned judge who gave the opinion of the court in the foregoing case of *Hood v. The New York & New Haven Railroad Company*, in support of the application of the doctrine of *ultra vires* to defeat the action, is similar to that presented in the English case, *East Anglian Railways Company v. Eastern Counties Railway Company* (see *ante*, Ch. I), and in other cases in actions on contract where the defense of *ultra vires* was made; and the observations of BUTLER, J., in *Converse v. Norwich & New York Trans. Co.*, above copied, are just and forcible, and his propositions and conclusions are logical deductions from the premises laid down in some

of the earlier cases. His concession that the large increase of the business of common carriers, which has rapidly multiplied corporate associations for that purpose, and which has rendered "it desirable for them and the business community that they should have power to make business connections and contracts with each other, and assume joint responsibility for carriage beyond the termination of their routes"; and that "the tendency of the courts is almost universally to recognize their power so to do, where the purpose is auxiliary, beneficial and within a reasonable limit, as an intended or necessary incidental power by a liberal construction of the legislative grants," and the discordant decisions of the courts as to the application of the doctrine to such contracts, or as to what cases it should, in suits on executory and executed contracts, be applied or qualified, may well lead us to seriously consider whether in its application to such cases the doctrine rests upon any sound foundation whatever. In many recent cases and well-reasoned opinions it has been maintained, as we shall hereafter see, that it has no proper application to such contracts; that it never rested on any solid foundation in its application, especially to executed contracts, where the corporation had received and appropriated the benefit of them. These views will be found ably presented in the following leading case of *Bissell v. The Michigan Southern & Northern Indiana Railroad Companies*, 22 N. Y., 258.

Where the doctrine of Hood v. New York & New Haven Railroad Company was not followed.—In *Cary v. Cleveland & Toledo R. Co.*, 29 Barb., 35, the plaintiff brought an action to recover the value of baggage delivered to the defendant at Toledo, in the State of Ohio, to be carried to Buffalo, in the State of New York, and there delivered to the passenger to whom it belonged, but which the defendant failed to deliver. The defendant was a corporation organized and constituted under the laws of the State of Ohio for the construction and operation of a railroad for the transportation of freight and passengers between Toledo and Cleveland, in that State. Between Cleveland and Buffalo there were two other railroad lines in operation, the Cleveland, Painsville & Ashtabula and the Buffalo & State Line. At Buffalo and Toledo tickets were sold and baggage checked over all these routes; and the plaintiff's assignor purchased a ticket of defendant's agent, at Toledo, over the whole route to Buffalo, and received a check for her baggage which entitled her to receive it at Buffalo.

One of the defenses interposed was, that the contract was *ultra vires*, the defendant having no power to contract to carry beyond the terminus at Cleveland. But the court held that where corporations owning separate lines of railroad connect with each other and form a continuous route, and enter into an agreement with each other by which at either terminus passage tickets may be sold and baggage checked over their roads to the other terminus, a person purchasing a passage ticket at one terminus over all the roads, and receiving a check for his baggage over the whole route, could recover of the company from whom he purchased the ticket the value of his baggage in case of the loss of the same, under the same circumstances that he might recover if the company from whom he purchased had owned and operated the whole route; and that the plea of *ultra vires* could not be successfully interposed in such a case. In this case

the court say: "Contracts should be palpably *ultra vires* before they should be held to be void for that reason, at the instance of the company, as against innocent third persons dealing with it. Corporations should be restricted so far as courts can in the exercise of their powers limit them to the exercise of their legitimate functions; but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it. Eminent judges have expressed regret that covenants entered into deliberately and with fair intentions on both sides, should be resisted on the ground of *ultra vires;* a sentiment, says Lord CAMPBELL, after quoting it from Lord St. Leonard, 'in which we should all concur.' (*Mayor of Norfolk v. Norfolk Railway* 4 E. & B., 446.)

"EARLE, J., in the case last cited, conceding that it stood decided that a statute incorporating a company for public purposes prohibits by implication some contracts, claims that the prohibition by which that principle is to be implied, and the class of prohibited contracts is to be defined, is not laid down with the precision which removes doubt, and advances the opinion that the legality of this doctrine of an implied prohibition could be properly discussed only in a court of error. But acts of a corporation not within the corporate power, *ultra vires*, are void, and the contracting parties are not estopped by the contract itself from alleging the invalidity, when they are sought to be enforced. *Mechanics' Bank v. New York & New Haven Railroad Company*, 13 N. Y. (3 Kern.), 599. It would seem from the reasoning of Judge COMSTOCK, in the case cited, that there would be no case in which the corporation would be estopped from setting up a want of power to make the contract upon which it is sought to be charged. Whether the learned judge intended to be so understood is not material in this case, for the reason that there is no circumstance upon which an estoppel can be predicated in the case before us. No fraud was practiced upon the other contracting party; and if the contract could not take effect as the contract of the defendant for want of power to make it, it could take effect in another way consistent with law and the intention of the several railroads interested in it. Certain contracts have been held *ultra vires* when made by railroad corporations, but they have been for the construction of some independent work not embraced within the line of the road which they have been authorized to make, and having no necessary connection with the work for which they were incorporated. The principle of these decisions may be referred to the expression of Lord CAMPBELL, in *Mayor of Norwich v. Norfolk Railway Co., supra.* 'They (railway companies) have certain powers unconnected with locality; but they have other powers which may be exercised within the area specified by the act of Parliament creating the company. They cannot lawfully extend the railway beyond the prescribed limits, or alter the line on which it is to be constructed.' While, in respect to acts which, within the remark of Lord CAMPBELL, are 'territorial' in their character, such as the purchase and holding of real estate, the construction of the railway, harbor, depot, and the like, they can be upheld, if done without the limits of the territory within which the corporation is permitted to act, for the reson that they may tend to advance the objects of the

incorporation to increase the tariff upon the railway, or increase the profits of the shareholders (per Lord LANGDALE, in *Coleman v. The Eastern Counties Railway Company*, 10 Beav.), the rule is not the same as to acts 'unconnected with locality'; and in such cases acts in furtherance of the main object and for the purpose of effectuating it, are valid, if not illegal by the law of the place where they are performed, and not expressly prohibited by the charter. This distinction is recognized in all the cases in fact, although not, perhaps, in words; and there is no discrepancy between the cases holding one class of contracts void and another valid.

"Those cases in which railway companies have been held to their contracts to be performed beyond the terminii of their roads, and outside of their territorial limits, when such are personal in their nature and within the general scope of the powers conferred, are not cited as bearing upon, or treated as overruled by the cases avoiding contracts of a different character. The converse is equally true. The cases are not treated as coming in conflict with each other. *The Mayor of Norwich v. The Norfolk Railway Co.* (4 E. & B., 397), was not decided, except *pro forma* by the withdrawal of the opinion of the junior judge, to enable the parties to bring error. It was a border case and if the contract was void it was for the reason urged by Lord CAMPBELL that it contemplated an act which the company could only perform within the prescribed limits. *The Eastern Counties Railway Company* (11 B. C., 775), was the case of a contract of a like character, and JARVIS, C. J., in delivering the opinion of the court, says: 'It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act, and that their funds can only be applied for the purposes directed and provided for by the statute.' So in *The Caledonia and Dumbartonshire Junction Railway Co. v. The Hohnsburgh Harbor Trustees*, decided in the House of Lords in 1857, and reported in 39 English Law and Eq. Rep., 28, it was held that the contract being to expend money in the construction of a harbor not contemplated by the act of incorporation, was void as *ultra vires*. The Connecticut cases of *Hood v. The New York and New Haven Railroad Company* (22 Conn., 1), and *Naugatuck Railroad Company v. Waterbury Button Company* (24 Id., 468), carry the principle of limitations upon the corporate power of railway companies to a greater extent. * * *

"The contract which was enforced in *Muschamp v. Lancaster & Preston Junction Railway Company* (8 M. & W., 421), was on all fours with this, so far as it was affected by the question of power. A parcel was delivered at Lancaster to the Lancaster & Preston Railway Company directed to a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid on its delivery. The L. & P. Railway Company were known to be the proprietors of the line only so far as Preston, where the railway connects with the North Union Line and that further on with the road of another company, and so on into Derbyshire. The parcel was lost after it was forwarded from Preston. It was held that the L. & P. Railway Company was liable. The Judge charged the jury that when a common carrier takes into his care a parcel directed to a particular place and does not by positive agreement limit his responsibility

to a part only of the distance, it was *prima facia* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although beyond the limits of his ordinary trade as a carrier. Lord ABINGER, chief justice, held that what was the contract was properly submitted to the jury. *Watson v. The Ambergate, Nottingham & Boston Railway Company* (3 Eng. L. & Eq. R., 497), affirms in the Queen's Bench the doctrine of Muschamp's case, with this variation from it in circumstance—that in Watson's case the clerk of the railway company received pay for the carriage over the defendant's line, only. See, also, *Scottham v. The South Staffordshire Railway Company* (18 Eng. L. & Eq. R., 553), to the same effect."

In *Weed v. The Saratoga & Schenectady, Railroad Company* (19 Wend., 534), although the case went off upon another point, Judge CARSEN says: "The defendants having undertaken to carry from the Springs to Albany, cannot now be received to say that they were in truth carriers no further than Schenectady, the termination of their own road. As to the parties for whom they may thus undertake, they are estopped to deny that they are carriers for a distance commensurate with what they engage for."

The same question was involved and decided in *Hart v. The Rensselaer & Saratoga Railroad Company* (4 Seld., 37). In this case three separate railroad companies, owning distinct portions of a continuous line between two terminii, ran their cars over the whole route, and employed the same agents to sell passage tickets and receive baggage to be carried over the entire line. It was held that one of the companies might be sued for the loss of baggage received by it at one terminus to be carried over the whole road. See, also, the same principle held in *Bard v. Poole* (2 Kern), 12 N. Y., 495; *Quimby v. Vanderbilt*, 71 N. Y., 306.

ULTRA VIRES NOT APPLICABLE TO THE CONTRACTS OR TORTS OF CARRIERS BEYOND THEIR CHARTERED LINES—NOT APPLICABLE TO CORPORATE TORTS.

SEVENTH SELECTED CASE.

BISSELL v. THE MICHIGAN SOUTHERN & NORTHERN INDIANA RAILROAD COMPANIES.*

Where two corporations, chartered respectively by the States of Michigan and Indiana, with power to each to build and operate a railroad within its own State, have united in the business of transporting passengers over a third road, in the State of Illinois, beyond the limits authorized by the charter of either, such corporations are jointly liable for injuries to a pas-

*Reported in 22 N. Y., 258 (1860).

senger resulting from the negligence of their employes. The following propositions were discussed, but not passed upon by the court; viz.,

Corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so, their exemption from liability cannot be claimed on the mere ground that they have no attributes or faculties which render it possible for them to act. Per COMSTOCK, CH. J., concurring.

Corporations have no right to break their charters, but they have capacity to do so, and to be bound by their acts where a repudiation of such acts would result in manifest wrong to innocent parties. Per COMSTOCK, CH. J.

A corporation is more than an agent of the shareholders. Such bodies are clothed with the legal title to the property or funds which represent the capital, in trust, however, for the shareholders who are the beneficial owners; and, like other trustees, it is impossible for them to deal with the capital in a manner and for purposes not authorized by their charters, and to be bound by such dealings. Per COMSTOCK, CH. J.

The plea of *ultra vires*, according to its just meaning, imports not that the corporation could not, and did not in fact, make the authorized contract, but that it ought not to have made it. Such a defense, therefore, necessarily rests upon the violation of trust or duty toward the shareholders, and is not to be entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. Per COMSTOCK, CH. J.

When corporations abuse their powers the State may interpose and reclaim their charters. So a threatened abuse may be arrested by the courts at the suit of the shareholders. So, also, the shareholders may recover their damages against the officers and agents who have diverted the capital to improper purposes. Per COMSTOCK, CH. J.

Where a corporation has received the consideration of its unauthorized contract, and a restitution will not do complete justice, the remedy of the other party is not confined to a suit in disaffirmance of such contract, but may be directly upon it. So the contract will be enforced under any circumstances of controlling equity. Per COMSTOCK, CH. J.

The contracts of corporations, made in excess of their rightful powers, but free from any other vice, are not illegal in the sense of the maxim, *ex turpi causa*, etc. The illegality of a contract in that sense is determined by its quality, and does not depend on the person or being which makes it. Per COMSTOCK, CH. J.

The powers and privileges of corporations are conferred not for the private convenience of the corporators but for public purposes, and to promote the public interest. They are granted at the expense of the public, since they create advantages which persons unincorporated do not possess. The public benefit is treated as a compensation for the grant;

and it would be an abuse of legislative power to make the grant except in contemplation of such a benefit. Per SELDEN, J.

The legislature, in conferring corporate power is presumed, in every instance, to have carfully considered the public interest, and to have granted just so much power as that interest requires. Per SELDEN, J.

If corporations are permitted to usurp powers not granted, it is done at the expense of the public. Sound policy, therefore, demands that they should be kept strictly within their chartered limits; and every contract made by them which exceeds those limits, like all other contracts in contravention of public policy, is illegal and therefore void. Per SELDEN, J.

It is a good defense to a corporation, when sued upon a contract, that in making such contract it exceeded its corporate powers; this defense being allowed not for the sake of the corporators, but for that of the public. The corporation would, however, be estopped from setting up the defense, in a case where the other party to the contract could not be presumed to be cognizant of the excess of power. Per SELDEN, J.

Although corporations cannot rightfully do any acts not authorized by their charters, yet such acts, when done by their direction and for their benefit, are to be regarded as corporate acts; and if, in the course of their performance, the agents of the corporation are guilty of negligence by which others are injured the corporation is responsible, such liability arising not from any contract between the parties but from the duty which every railroad company owes to persons within its cars with its consent and not as trespassers. Per SELDEN, J.

Appeal from the Supreme Court.

ACTION against two distinct railroad corporations for a breach of their duty, safely to convey the plaintiff, a passenger, upon a train of cars, which they, by contract between them, had united in running, and by means of the negligence of their agents suffering a collision with another train, by which the plaintiff's leg was broken. The trial was before referees, who found these facts:

The Michigan Southern Railroad Company was chartered by the State of Michigan to build and operate a railroad through the southern part of Michigan; and the Northern Indiana Railroad company was chartered by the State of Indiana to build and operate a railroad through the northern part of the State of Indiana. The Southern Michigan Railroad Company built the road through the State of Michigan, and the Northern Indiana Railroad Company built the road through the State of Indiana; and also, in conjunction with another railroad company,

they built the railroad from the northern part of the State of Indiana, through a part of the State of Illinois, to the city of Chicago. Previous to the 25th day of April, 1853, the Southern Michigan Railroad Company and the Northern Indiana Railroad Company formed a business connection, under the name of the Michigan Southern and Northern Indiana Railroad Companies, and on or about the 25th day of April, 1853, ran their cars carrying passengers and freight from Lake Erie to Chicago and the intermediate places, and from Chicago to Lake Erie and the intermediate places, through the States of Ohio, Michigan, Indiana and Illinois. The cars and other property connected with these roads were used by the Michigan Southern and Northern Indiana Railroad Companies jointly, and each shared in the profits and losses. The business of the companies was carried on and transacted under their joint name, and the companies were practically consolidated into one. The defendants, on the 25th day of April, 1853, and at the time this action was brought, had, in the city of New York, in this State, a general office of business, occupied by their president and treasurer, where a large portion of their moneys, funds, and other property was kept. On the 25th day of April, 1853, while the defendants were jointly operating these roads, from Chicago to Lake Erie, through the States of Illinois, Indiana, Michigan and Ohio to Lake Erie, the defendants took into a train of their cars, near Chicago, in the State of Illinois, the plaintiff and his baggage, as a passenger therein, to Toledo, for fare and reward. While the plaintiff was on the defendants' cars, and while being conveyed by them eastward on said road, in the State of Illinois, the defendants' cars were run carelessly, at a hazardous speed at the crossing of the Illinois Central Railroad, and the road occupied and run by the defendants; by means whereof the defendants' cars run into and came in collision with a train of cars then running on the Illinois Central Railroad, across the said road owned and occupied by the defendants, and a passenger car of the defendants, which the plaintiff occupied, was broken to pieces, and the plaintiff damaged and injured in his person and property.

The referees reported in the plaintiff's favor for $2,500, for

which judgment was entered; and such judgment having been affirmed at general term, in the sixth district, the defendants appeal to this court.

COMSTOCK, CH. J.—A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the State of Illinois, and through the States of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement which had been in force between the defendants for some time previous to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger from Chicago, or a point near that place eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that during the journey he was injured by an accident which happened through their carelessness and neglect. Assuming the truth of this statement there is no doubt of the plaintiff's right to recover. But the defendants deny the legal truth of these facts because one of the companies was chartered by the legislature of Michigan, with power to build a road in that State, and the other by the legislature of Indiana, with power to build one in that State. They both insist they had no right or power under their respective charters to consolidate their business in the manner stated, and especially that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract in the customary fare which he paid. Their defense is, simply and purely, that they transcended their own powers and violated their own organic laws. On this ground they insist that their

business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois; that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can, then, two railroad corporations, having connecting lines, thus unite their business for the purpose of promoting their common interest; charter another connecting road in furtherance of the same policy; hold themselves out to the public as carriers over the whole route; enter into contracts accordingly; receive the benefit of those contracts, and then when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defense is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think it has no foundation in the law.

The doctrine has certainly been asserted on some occasions that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain facilities given to them by law, which facilities are limited to the precise purposes and objects of their creation, and can no more be exerted outside of those purposes and objects than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view these artificial existences are cast in so perfect a mould that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are respon-

sible. But such, I apprehend, are not the nature of these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of, in respect to artificial, than in respect to natural persons.

I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful the corporation and its stockholders gain the result. If a depression occurs in the market and disaster is threatened, the doctrine that a corporation can never act outside its charter, enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value, while the injured dealer must seek his remedy against agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain without incurring the hazards of loss.

Familiar maxims of the law must be reversed. In the relation of private principal and agent the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner.

The proceeds of unauthorized adventures may be received and become blended with their legitimate business and funds so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the deal-

ing, it is a self-evidenced proposition that no rule of estoppel can change the result.

It is not uncommon, in charters of corporations, to lay express prohibitions upon them as a limitation of their powers, having in view the maintenance of some public policy; as, for example, prohibitions relating to the currency of the State. If they violate these prohibitions, they have been supposed to be public offenders, and on that ground the law has always denied to them its remedial process either in affirmance or disaffirmance of their unlawful contracts; thus regarding them as private offenders are regarded. But this rule of law must be overthrown, if we admit this theory of constitutional inability in corporations to overstep the limits of rightful power. In the case of *The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company* (7 Wend., 31), it was contended that a certain corporate transaction, if unlawful, was to be regarded as the act of the agents or officers of the company, and not of the company, and, therefore, that the company should be allowed to recover back the money or property improperly disposed of. That doctrine was refuted by Mr. Justice SUTHERLAND in this language: "This would be a most convenient distinction for corporations to establish—that every violation of their charter or assumption of unauthorized power on the part of their officers, although with a full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." These remarks suggest an unanswerable argument against the doctrine. Why, it may be asked, does the law provide the remedy by *quo warranto* against corporations for usurpation and abuse of power? Is it not the very foundation of that proceeding that corporations can and do preform acts and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the State interposes, alleges the excess or abuse, and on that ground demands from the courts a sentence of forfeiture.

One of the sources of error in reasoning upon legal, as well as other questions, is, in exactness in the use of language, or, perhaps, in the imperfectness of language to express the varieties of thought. It is a self-evident truth that a natural person cannot exceed the powers which belong to his nature. In this proposition we use words in their literal and exact sense. In the same sense, it is a truth equally evident that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being it cannot experience religious emotion, or feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said they cannot exceed those powers; therefore, it has been urged that all attempts to do so are simply nugatory. The premises are correct when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the State, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense natural persons are under the restraints of law, but they may transgress the law, and when they do so they are responsible for their acts.

From this consequence corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through which it may be exerted in modes of action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

A great variety of cases might be supposed in which this doctrine of corporate exemption from liability could not be de-

fended upon any rule of reason or principle of justice. But, perhaps, none of them would afford a more persuasive illustration than the one now under consideration. Let us look at the facts and consider the results. These corporations had boards of directors in whom were vested every power, faculty or function which belonged to the bodies they represented. We have, then, no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals. Indeed, in an important sense, they were the principals, because their authority was not received by delegation from any other principal. These boards proceeded to consolidate the two lines of road, and they included in the scheme another connecting road. This being done, they entered into all the relations of carriers with the public, and the entire business of both companies was thus conducted for a period of several years, with no complaint on the part of State sovereignties which granted the charters, and none on the part of the shareholders. All the gains and profits of the business were received to the use of the corporations, and it is to be assumed that the shareholders were benefited thereby. The question arises, where were these companies and what were they doing during all this period? The question would be the same if that mode of conduct were to continue without limit of time. If the acts mentioned were in excess of the powers granted, and if we concede the doctrine that such acts are in all circumstances to be imputed to the agents who perform them, the conclusion follows that the corporations became virtually extinct by a non-user of their franchises. If the business thus conducted was not the business of the companies, they were engaged in none whatever, and thus, practically, if not legally, ceased to exist. If it was the business of the directors as natural persons, then those persons must be deemed not only to have taken a wrongful possession of all the estates and funds of the corporations they profess to represent, but also to have usurped their franchises and to have stolen their corporate names and seals.

If this be the legal interpretation of the course of dealing and conduct actually carried on under the acts of its incorporation, passed by the legislatures of Michigan and Indiana,

then the companies might have been proceeded against by those States, not on the ground of a usurpation of the powers and privileges which did not belong to them, but for a total non-user of the franchises which did belong to them; while, on the other hand, writs of *quo warranto* might have been issued against the individual directors and agents for usurping corporate rights without any charter at all. (16 Wend., 655; 23 Id., 193; 3 Bl. Com., 263.) These conclusions are not founded on any known principle or practice, and they are totally opposed to the facts of the case. In rejecting them, we must also reject the theory of corporate perfection and immunities on which they were based, and we are compelled to hold that those companies, as legal and accountable persons, engaged themselves in the business of carrying passengers and freight under and according to the arrangements which have been mentioned, and thereby placed themselves in that relation to the public, and to the plaintiff in particular, which is the subject of the present controversy.

But the doctrine that corporations can never be bound by engagements not justified by the grant of power from the State, is next defended on a different ground. Although it be conceded that they are present, and acting as legal persons, or entities, when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being, whereas the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist in the performance of acts perfectly lawful in themselves, but which, being done by a corporation, and not by individuals, are pronounced illegal because they are so done without authority contained in the charter.

But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a

malum in se, or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in earlier English railway cases. (*The East Anglian Railways Company v. The Eastern Counties Railway Company*, 7 Eng. Law and Eq., 509; *McGregor v. Deal and Dover Railway Company*, 16 Id., 180); but it was never established, and is not now received in English courts. (*The Mayor of Norwich v. The Norfolk Railway Company*, 30 English Law & Eq., 120; *The Eastern Counties Railway Company v. Hawkes*, 35 Id., 8, 37.) The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight objection named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors, and under the corporate seal, for the building of a church or college, or an alms-house, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a school-house or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts or books of instruction for distribution amongst them. Such dealings are outside of the charter; but so far from being illegal or wrong, they are in themselves benevolent and praiseworthy.

So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal because dealing in exchange

is, in itself, a lawful business, and there is no State policy in restraint of that business.

To illustrate the subject in another manner. An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its powers from the State, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal because they violate no public interest or policy. My meaning, in short, is that the *illegality* of an act is determined in its quality, and does not depend on the person or being which performs it.

There has been, I think, some want of reflection even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations with certain specified powers, and no others. A private or trading corporation is essentially a chartered partnership with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed to be held and used, however, in trust for the shareholders. Now, in a well regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business and obtain one. We shall find it to contain the like specification which becomes the grant of power from the sovereign authority of the State. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or govern-

mental charters, the class of powers here referred to will be found to cover nearly the whole field of corporate rights. It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business with greater advantages; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concern of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires;* and if the directors of such a corporation, as I am here speaking of, do the same thing, their acts are also *ultra vires* in the same sense and no other. To apply the word "illegality" to such transactions is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offenses.

In every treatise upon the law of contracts—and there are many of them—we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the condition or the promise. Where both of these are lawful and right the maxim "*ex turpi contractu non oritur actio*" can have no application.

The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their

dealings outside of their charters are deemed illegal for that cause. Even the proceeding against them by *quo warranto*, for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. (2 Kyd on Corporations, 439; Angel & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf., 267.) Our statute on this subject makes it the duty of the Attorney-General to institute the proceeding, under leave of the court, when the case is one of public interest, but in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the State. (2 R. S., 583, §§ 39, 40.) In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the non-user or misuser of the franchises granted to a corporation, it is purely a civil right which is tried, and the judgment is not penal, but simply one of ouster from the right claimed. The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the State, and may declare such acts to be public offenses, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the State. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to State policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments in any sense which is material to the present inquiry. I do not deny that there is, in a different sense, a legal wrong in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract.

But the true inquiry here is, whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the courts must, in all circumstances, accept that defense without regard to the situation and right of the other party. I cannot believe such to be the rule of reason or of law.

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may and often do exist which estop the offender from taking advantage of his own wrong. The contract may be entered into on the one side without any participation in the guilt and without any knowledge, even, of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract—in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose?

So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is, also, *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not *in pari delicto?* Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corporation are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached where they are not attended by the vices which are fatal to private contracts, also. I have shown I trust: 1. That such dealings are possible in law, as they often take place in fact; in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple ex-

cess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality so as to avoid the contract or dealing on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but, on the contrary, are innocent and lawful in themselves. 3. Even illegal contracts, in the proper sense, are not universally and indiscriminately to be adjudged void; and especially this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offense.

If these negative conclusions cannot be denied it follows that contracts and dealings, such as I have been speaking of, are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle, justly applied to particular instances, the question in such cases is to be resolved. The original subscribers constitute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But legally the ownership is vested in the corporate body impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of *ultra vires*.

That term is of very modern invention and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make; but because such was the nature of the contract, it presents the breach of trust, or duty, to the shareholders as an excuse for the non-performance. And I

do not deny the validity of this excuse in many cases. I may say in all cases where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts where no greater equities demand it. Corporate bodies are more than mere agents. They are more than a partner who manages as the agent of his associates. Their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust.

But the equitable rights of shareholders will enable them, in many circumstances, to claim the affirmative interposition of the courts to arrest an unauthorized course of dealing, or to prevent a threatened diversion of the capital to improper uses. Of this character are many of the cases usually cited to prove that corporations cannot exceed their powers. (*Dodge v. Woolsey*, 18 How., U. S., 331; *Rolf v. Rogers*, 3 Paige, 154; Angel & Ames, on Corp., 424, 4th edition, and cases cited.) So, too, it is plain, without citing authority, that a stockholder who can show that he has sustained a pecuniary loss by such a use of the capital, may have his redress in damages against the individuals who commit the wrong, unless he has himself acquiesced. These are extensive and it would seem ample remedies to prevent or redress the abuse of powers; and it appears to me a much higher and better policy that the private shareholders should be confined to these remedies than to sacrifice the interests of the rest of the community by conceding to these bodies absolute immunity wherever power is thus abused. But the principles which belong to this question need not present that naked alternative. In many cases no injustice will be done by receiving the plea of *ultra vires* when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer, and where the defense, if allowed, will leave the parties substantially in the enjoyment of the previous rights. An artificial, not less than a natural, person having the title

and possession of an estate which, in equity, belongs to others, and entering into engagements inconsistent with duty or trust, should have a *locus penitentiæ*, when it can be allowed without manifest wrong to others. It may be difficult to lay down a rule so general and exact as to include every case; but the principles and analogies of the law will be sufficient for the solution of such questions as they arise. Justice, not only in this, but in very many other cases of constant occurrence, can be administered according to law if I have succeeded in showing, negatively, that a comparison of the charter of a corporation with what it actually does is not always the test of liability.

It is said that there will be no restraint upon the acts and dealings of corporate bodies, if we uphold them when in excess of rightful authority. To this I answer, that the most ample restraints will be found in the principles here advocated; while, on the other hand, if we concede to corporations immunity in all cases when they do wrong, we invite and reward the very abuse. It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position necessarily concedes that the corporation, as a legal person, made the unauthorized contract and received the money or value under and according to it; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute validity of such dealings is claimed to rest; for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer further, that while in many cases the remedy of a suit in disaffirmance of the agreement and to recover back the consideration will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground

with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to preform the service of carrying him in their cars, perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was $2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice of confining him to the remedy of disaffirmance because the agreement was *ultra vires* must be quite apparent.

I have examined these questions with the more attention because, aside from their bearing on the present controversy, they are of great practical importance. A vast amount of the business of the community has come to be carried on under corporate forms of organization. Besides innumerable special charters we have general laws which impart corporate attributes to associations formed according to articles of agreement for a great variety of purposes. When we consider these to be any less than partnerships, with the superadded privileges of succession of a corporate seal, etc., we forget that corporations are no longer confined to the exercises of public or political franchises. These commercial, manufacturing and trading bodies are brought into relation with every member of the community; and I think it greatly to be desired that in laying down the rules of law which are to govern in such relations we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men.

If we could find the law to be settled in the manner which must be and is contended for in order to exonerate the defendants in this case from responsibility it would be our duty to follow it. But such is not the case. There are certainly judicial opinions and some adjudged cases which countenance the extreme doctrines on which the defense must rest. Among these cases, a leading one is that of *Hood v. The New York and New Haven Railroad Company* (22 Conn., 502). That case appears to go the length of holding that corpora-

tions cannot and never do preform acts in excess of their powers. No authority was cited for such a proposition, and it cannot, as I think I have shown, be maintained. Another extreme authority is, *Pearce v. The Madison and Indianapolis Railroad Company* (21 How., U. S., 442), where it appeared that a corporation, in furtherance of its general objects, although, strictly speaking, in excess of their powers, had entered into an engagement upon a consideration which it had received and appropriated. It was allowed to repudiate that engagement; but the principles of the question were not much discussed. A considerable number of other cases and *dicta*, of a character less marked, but tending in the same direction, might be referred to. But, on the other hand, there are well considered authorities which sustain the principles advocated in this opinion. (*The Steam Navigation Company v. Weed*, 17 Barb., 378; *The Silver Lake Bank v. North*, 4 Johns., Ch., 370; *The Chester Glass Company v. Dewey*, 16 Mass., 94, 102; *The Bank of Genesee v. The Patchin Bank*, 3 Kern., 309, 314; *Buckley v. Derby Fishing Co.*, 2 Conn., 252, 255; *Parker v. The Boston and Maine R. R.*, 3 Cush., 107, 108; *Aleghany City v. McClurkan et al.*, 14 Penn., 83; 29 Verm., 93.) In the case from 2d Connecticut, it was said: "A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire immunity to the prejudice of third persons? It will be found, indeed, that such a doctrine is of very modern origin. In the case from 14 Pennsylvania, COULTER, J., observed: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly; and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank, which has been long in the habit of doing business of a particular description, would not be exonerated from liability because such business was not expressly authorized in its charter.

The object of all law is to promote justice and honest deal-

ing when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the acts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly and in such a manner as, by necessary and irresistible implication, to be within the knowledge of the corporators. One rule of law," he adds, "is often met and counterchecked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust or confide in the unauthorized acts of their agents. If they receive the avails and value of those acts it is implicit evidence that they consented to and authorized them." A more particular discussion of the authorities on either side would not be profitable. The general question is one which ought to be considered on principle, and I have so viewed it, because I find no settled rule which stands in the way of such an examination.

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simply wrong-doers. If their contract was *ultra vires*, and that defense to an action upon it must be received as absolute and peremptory—if no principle of estoppel or rule of justice can be urged against that defense—then it is more clear that the simple wrong to the plaintiff's person was also *ultra vires*. It was with considerable difficulty that the liability of a corporation in any case for a pure tort was ever established, and that they are never so liable except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants' express undertaking was absolutely void, so that no duty could arise therefrom, the implied undertaking resulting from the actual attempts to carry the plaintiff as a passenger is encountered by the same objection, and there is nothing left of the transaction except a pure and simple tort,

committed by the defendants' servants while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain that this theory of liability will not sustain the plaintiff's case.

But I have no hesitation in affirming the judgment of the court below upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them was chartered to build a railroad, the terminii of which was specified. They built the roads and then consolidated their business. The common interest might thus be promoted, but it is difficult to affirm that the charter of either authorized its capital to be blended with that of the other. It is equally difficult to hold that they had any rightful authority to construct or lease another road in continuation of the line. But these things were actually done and they were done openly and publicly. If these acts were an abuse of power the shareholders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard and their acquiescence must be presumed. If State sovereignties were wronged by the course of dealing pursued no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveler into their cars, and after injuring him by their negligence, reject the responsibilities of their contract. A traveler from New York to the Mississippi can hardly be required to furnish himself with the charter of all the railroads on his route, or to study a treatise on the law of corporations. The present case, in short, plainly falls within the principles of corporate liability herein asserted, and the defendants must respond to that liability. The judgment should be affirmed.

SELDEN, J.—It was not strenuously insisted upon the argument that the acts of these two railroad companies in entering into the arrangement formed by the referee, and in running their cars upon joint account through the States of Ohio, Indiana and Illinois, were authorized by law; nor have I been able to find in the statutes of those States any sufficient warrant for these acts. I shall assume, therefore, that in undertaking to carry the plaintiff from Chicago, in the State of Illinois, to Toledo, in the State of Ohio, the defendants exceeded their corporate powers; and, as the allegation in the complaint of carelessness and negligence on the part of the defendants or their agents is fully sustained by the finding of the referee, the defense must rest exclusively upon this want of power. The counsel on both sides have treated the action as founded upon contract, and in that aspect of the case the question arises whether want of authority on the part of a corporation to enter into any engagement is a valid defense to such corporation when sued for its violation.

This question has not until lately attracted much attention. But the recent rapid multiplication of these artificial bodies and the extensive powers and privileges conferred upon them have made it a question of importance. It has, within a few years past, been repeatedly presented to the courts both in this country and in England, and with one unvarying result. I cannot, myself, regard it, therefore, as in any just sense open to discussion. If questions which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then are we without any stable foundation of law or justice. The evils attendant upon setting legal principles afloat upon a sea of uncertainty and doubt, and causing them to depend upon the fluctuations of individual opinion are too obvious to need enumeration. Confidence in courts is only to be obtained by their exhibiting stability in their own decisions, and a becoming respect for those of other tribunals. It has been so often and uniformly decided that corporations are not bound by contracts which are clearly *ultra vires*, that to hold the contrary now would take the legal profession by surprise and introduce more or less confusion into this important branch of the law.

But, while I protest against considering this as an open question, and insist that it should be treated as settled by authority, I also maintain that the numerous decisions on the subject by both the English and American courts rest upon a solid foundation of reason and principle. Much of the apparent force of the arguments used to prove the contrary is produced by substituting an entirely false basis for those decisions. If they really rested, as has been sometimes supposed, upon the ground that because corporations are artificial beings, having no natural powers but only such as are conferred upon them by law they cannot by possibility do any act beyond the limits prescribed by their charters; and hence that no such act, although done by their agents in their name and for their benefit, can be considered as a corporate act, but must, in all cases, be treated as the personal act of such agent, it would, indeed, be easy to show their fallacy. This would be, as is justly said, to attribute to them a degree of perfection that belongs to no earthly existence, whether natural or artificial. To present this as the true foundation of the rule which exempts corporations from liability for their unauthorised acts is entirely to misapprehend the whole doctrine on the subject.

No court has ever held that the defense of *ultra vires* rested upon any such ground as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction so frequently drawn between natural persons and corporations as mere artificial existences, with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightly exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers. The case of *Barry v. The Merchants' Exchange Company* (1 Sandf. Ch. R., 280), will serve to illustrate the force and application of the distinction.

The question in that case was whether a corporation created for the purpose of erecting a building to be used as a public exchange in the city of New York, had power to borrow money to enable it to accomplish the object of incorporation, no pro-

vision conferring this power being contained in the charter. The Vice-Chancellor in deciding this question in the affirmative, said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations *in the same manner as an individual.*" This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory and is designed to show, that as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defense its own want of powers to enter into a contract, two questions are involved; first, whether the contract was, in truth, beyond the corporate powers; and, second, if so, whether this is available as a defense. It is only in reference to the first of these questions, and to prove that the contract was really *ultra vires*, that the argument has been resorted to, that a corporation has no natural powers. The excess of power being established, the question whether this constitutes a valid defense depends upon entirely different considerations.

The assumption, therefore, that the doctrine which declares the unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done anything but what it had a legitimate right to do, is wholly unwarranted; and, hence, the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case.

Corporations, as well as natural persons, may, no doubt, err. They may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise they could never be made liable for a tort; nor could they be proceeded against by *quo warranto*. The statute which authorizes the attorney-general to file an information in the nature of a *quo warranto* against an offending corporation (2 R. S., 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision five of the section re-

ferred to provides that the proceeding may be instituted "whenever it (the corporation) shall exercise any franchise or privilege not conferred upon it by law."

The real ground upon which the defense of *ultra vires* rests, and the only one upon which it has ever, to any extent been judicially based is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts; viz., those which are *mala in se*, i. e., which embrace something which the law deems in and of itself criminal or immoral; 2d, those which violate the provisions of some statute, and are hence called *mala prohibita*; and, 3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is that it exceeds the corporate powers, it cannot be considered as *malum in se;* and although, in this State, where we have a statute (1 R. S., 600, § 3), expressly enacting that no corporation shall exercise any corporate powers except such as their charters confer, the contrary might with much plausibility, be contended. I shall, nevertheless, concede, for the purpose of this case, that such contracts do not belong to the class styled *mala prohibita.*

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception. Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary may be for some benevolent or worthy object, as to build an almshouse or college, or to purchase and distribute tracts or books of instruction, yet if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void. Those, therefore, who hold that corporations are liable upon

their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position. Here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument by which it is sought to be shown that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said that a private corporation is simply a chartered partnership possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business; that, even in incorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are for the same reason specified in the charter; that the charter simply takes the place in this respect of the articles of agreement in the case of an unincorporated partnership; that, as the objects of such associations, although incorporated are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporation should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators so that any excess of power on their part amounts simply to a breach of trust toward their principals, it would not follow that the corporation is liable upon its unauthorized contracts. But I apprehend there are serious objections to this view of the nature of corporations and of the effect of their charters. In the first place if there is no public interest involved how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges which give them great advantages over mere private citizens whether individual or associated. The grant of such privileges upon the principles for which some of my

associates contend would be a pure piece of legislative favoritism which should be indignantly condemned. In this country, if no other, it is held to be the duty of government to protect the people in the enjoyment of *equal* rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarially at the expense of others; and it is against the fundamental principles of this government that this should be done, unless required by interests of a public nature. No doubt these principles are frequently violated and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant in every case.

Take, for instance, the very class of corporations in question here; viz., railroad corporations which are mere private associations organized by their members with a view to their personal profit and emolument; and yet their creation is considered so much a matter of public interest as to invoke the power of eminent domain by which the property necessary for their purposes is forcibly taken from its owners as for public use. The same is true of telegraph and plank-road incorporations. But, although the interest of the public in the creation of corporations of this class is made a little more obvious by the necessity which exists of taking from others property which is specific and tangible for the purposes of the corporation, yet the same principle applies to all corporations; for in all some value, corporeal or incorporeal is taken from a portion of the community and given to the corporators.

Will it be said that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such powers? It is, obviously, impossible to support such a position. The franchises and privileges given to corporations belong to the public, and it would be just as reasonable, and just as logical, to contend that, under a patent for one hundred acres of land, the patentee might take possession of two hundred without infringing any public interest. Every additional power given to, or usurped by, a corporation, extends its

advantages over persons unincorporated. If a bank is permitted to trade in merchandise, it comes in competition with others so employed. If a railroad company is allowed to build and sail ships, it comes in competition with those engaged in commerce; and so of every other branch of business.

The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them must, I think, be obvious. They are rapidly multiplying. Their privileges give them decided advantages over mere private, unincorporated partnerships. They have large capital and numerous agents, and are capable of entering into combination with each other. They are not only formidable to individuals, but might even, under some circumstances, become formidable to the State. They are, or should be, created, as we have seen, for public reasons alone, and the legislature is presumed, in every instance, to have carefully considered the public interest, and to have granted so much power, and so many peculiar privileges, as those interests are supposed to require. This reasoning is confirmed by the action of the legislature in expressly prohibiting corporations from exercising any powers not granted to them. (1 R. S., 600, § 3, *supra.*) By making this principle of the common law the subject of an express and positive enactment, the legislature has shown that it considered this restriction upon corporations to be a matter of public interest and importance.

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a *quo warranto* is in itself proof that the public has an interest in keeping such bodies within the limits of their charters.

But, it is said, that the proceeding by *quo warranto* is of a purely civil nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed. Upon this position I take issue. In the first place, the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the Attorney-General is authorized to institute proceedings in

the nature of a *quo warranto*, contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases; viz., whenever a corporation shall "1st, offend against any of the provisions of the act or acts creating, altering or renewing such corporations; or, 2d, violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d, whenever it shall have forfeited its privileges and franchises by non-user; or, 4th, whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges, and franchises; or, 5th, whenever it shall exercise any franchise or privilege not conferred upon it by law." (2 R. S., 583, § 39.)

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders. They all, without exception, relate to violations, not of individual rights, but of public law. The provisions, therefore, strongly, and, as I think, conclusively repel the idea that a *quo warranto* is a mere civil remedy, the object of which is to redress or prevent a private injury.

The proceeding is not only public and *quasi* criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed will afford the proper redress. There is neither occasion for, nor propriety in a resort to the proceedings by *quo warranto* for any mere private purpose, and I hazard nothing in saying that such is not the nature of that proceeding. If this conclusion is right it inevitably follows that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and, therefore, illegal.

This, then, is the true foundation of the defense we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act as a defense to a suit brought to enforce a contract which public policy forbids; viz., to discourage and

restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any other subsequent holder, because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him.

But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

A question analogous to this arises when public officers, who have done something in contravention of the statute under which they act, are afterwards sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel in the case of *Regina v. White* (4 Ad. & El., N. S., 101), that for public reasons officers so situated were not estopped, but Lord DENMAN said: "We have held that this is true only of a statute, the contents of which are publicly known; such a statute is to have effect, whatever dealings may take place; but when the persons acting, whether trustees

for public purposes or not, have done any act which was not known to the parties with whom they were afterward dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." This doctrine, which was also held in the case of *Doe, ex dem. Levy, v. Horne* (3 A. D. & El., N. S., 757), will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But, aside from these exceptional cases it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defense to an action brought upon it.

In referring to the cases which support these views I will notice the English cases first. There are three classes of cases in England in which the questions of *ultra vires* arise; viz. 1st. Cases in which one or more of the shareholders seeks to restrain the officers of the corporation from engaging in transactions unauthorized by the charter. 2d. Actions brought by third persons against corporations to enforce their contracts, in which the defense relied upon is, that in making the contract the corporation exceeded its corporate powers. 3d. Similar actions, in which the defense is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors or managing officers by deed.

These three classes of cases differ materially in their nature and principles, and if we would avoid confusion, must be kept entirely distinct in investigating the subject. Those of the third class have no bearing upon the question we are discussing. There are in England a class of corporations organized under general laws, which do not specify the manner in which the objects and purposes of the incorporation are to be effected, but leave this to be arranged by a "deed of settlement" between the corporators themselves. By this deed the companies prescribe and limit the powers and functions of their various officers so far as they are left uncontrolled by the statute and the general laws of the kingdom. Now, it is plain that there is no analogy between an act which merely transcends

the limits of this deed of settlement and one which violates the provisions of the organic act. The deed of settlement is the private act of the shareholders; and its provisions have respect solely to their private interests. It is a mere power of attorney and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved when the question is whether the officers have exceeded the authority conferred by this deed. The case of *Royal British Bank v. Turquand* (5 El. and Bl., 248), is one of this class of cases. By comparing the language of Lord CAMPBELL in this case with that used by him upon another occasion we shall obtain a clear view of the distinction here adverted to. In the case cited the action was upon a bond signed by two of the directors, and the question was not whether the giving of the bond exceeded the powers which the corporation itself had a right to assume, but whether it was authorized as between the shareholders and the directors by the deed of settlement. Lord CAMPBELL, in delivering the opinion, said: "A mere excess of authority by the directors, we think, would not amount to a defense." Of course, by this was meant merely an excess of authority by the directors as the agents of the stockholders, and not an unauthorized assumption of power as between the corporators and the public.

In the *Mayor of Norwich v. The Norfolk Railroad Company* (30 Eng. Law and Eq., 120), the same learned judge fully recognizes the distinction I take, and shows by the remark just quoted he by no means meant to say that corporations were bound by contracts which are *ultra vires* as between them and the public. He then says: "The mere circumstance of a covenant by directors in the name of the company *being ultra vires as between them and the shareholders*, does not necessarily disentitle the covenantee to sue upon it. * * * * But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for the goods, here would be a clear excess of authority on the part of the directors. * * * This would be an *illegal* contract to

misapply the funds of the company, and the illegality might be set up as a defense."

The phrase *ultra vires* is applied in the English cases both to acts which simply exceed the powers conferred by the deed of settlement upon the officers as the agents of the shareholders, and acts which transcend the powers conferred by law upon the entire corporation. This indiscriminate use of the phrase is calculated to mislead, unless the distinction referred to is observed. It is evident that the class of cases to which that of *Royal British Bank v. Turquand* belongs have no bearing upon the question under consideration, and hence they will be no farther noticed.

In all the cases belonging to the first class the object of the action has been to protect the private rights of the shareholders; upon the ground that the action of the directors sought to be restrained would, if permitted, be a breach of trust. It would, no doubt, be a bar to any relief upon this ground if it appeared that the parties seeking such relief had themselves assented to what the directors were about to do. They clearly could not be entitled, for their own sake, to protection against acts which they had themselves authorized. But the courts, in cases of this kind, have uniformly, and no doubt properly, acted upon the presumption that the shareholders had not assented to a violation of the charter and have interfered, if at all, for the purpose of protecting them from a breach of trust on the part of the directors.

Still it has been repeatedly said, even in cases of this class, that there was a question of public policy involved which would be sufficient of itself to induce the courts to interfere. The case of *Coleman v. The Eastern Counties Railway Company* (10 Beavan, 1), decided in 1846, was one of this class. It was an equity suit brought by a shareholder in behalf of himself and the other shareholders, against the corporation and its directors to prevent the latter from entering into a certain agreement with the *Harwich Steam Packet Company*. The bill prayed for a declaration that it would be a breach of trust on the part of the directors to make the proposed contract and for an injunction. Relief was granted. Lord LANGDALE, before whom the case was heard, speaking of the

extensive powers of railway companies, said: "We are to look upon their powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, is on the whole hoped to be attained *by the public*." Again, he says: "In the absence of legal decision I look upon the acquiescence of shareholders, in these circumstances, in these transactions as affording no ground whatever for the presumption that they be, in themselves, legal." Here, then, in one of the earliest cases on the subject, in the English courts, we have the very doctrine for which I contend distinctly recognized and asserted; viz., that the object of every grant of corporate powers is to obtain a *public* benefit; and that the powers granted are the consideration which the *public* pays for the benefit received or expected; and we also have the inevitable consequences stated that every excess of power by the corporation is illegal, although acquiesced in by every shareholder.

Three years afterward the case of *Cohen v. Wilkinson*, (13 Jurist, 641), came before the same judge. The complainant was a shareholder in the Direct Portsmouth Railway Company, and the object of the suit was to restrain the directors from proceeding to construct a portion only of the road authorized by the charter, without any preparation to construct the whole. The judge said: "If it were established that companies of this sort had authority, without a view to the whole, or for the purpose of performing the whole, to complete such part only as they please, or are able, of that which has been called their *contract or bargain with the public*, I think the consequences would be very dangerous *to the public* and to the shareholders, and probably productive of very extensive deception and fraud. "In a similar case which arose shortly afterwards; viz., *Salomons v. Laing*, (12 Beavan, 339), Lord LANGDALE said: "Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control and management of the directors, or governing body of the company, in any manner, *not distinctly authorized* by the act of Parliament, is, in my opinion, an *illegal* application or dealing."

Thus we find Lord LANGDALE on three different occasions,

asserting, in controversies between shareholders and the corporation, that all acts and dealings of the officers of such corporations which were unauthorized by their charters, were to be regarded, not simply as breaches of trust, but as illegal and therefore void. But Lord LANGDALE is not the only English judge who has held, in cases of this class, that the unauthorized contracts of corporations are illegal and void, as against public policy. In the case of *Beman v. Rufford*, (6 Eng. Law and Eq. R., 106), which was an action brought by a shareholder in a railway company, to restrain the directors from carrying into effect a certain agreement made by them, Lord CRANWORTH, Vice-Chancellor, after stating his reasons for thinking the contract unauthorized, said: "And if that be the correct view of the law, I am clearly of opinion, on all the authorities and all principle, that it is the province of this court to prevent such an illegal contract from being carried into effect; because, on the principle that has been so often laid down, this court will not tolerate that parties having the enormous powers which those railway companies have obtained, shall lay out one farthing of the funds, out of the way in which it was *provided by the legislature* that they should be applied.

Now, I understand those who differ with me on this subject to concede the principle of this case; that is, they admit that for the directors to enter into a contract which their charter does not authorize would be a violation of their duty to the shareholders, and that the latter may apply to a court of equity and obtain an injunction restraining the directors from carrying the contract into effect. It would be difficult to deny this. For, if we take the same view of the nature of a corporation which they take, and consider the directors merely as the agents of the shareholders, and the charter as nothing more than their power of attorney from the corporators, the latter, as the principals, would have a right to repudiate and prevent the execution of a contract made in their behalf by their agents without authority, inasmuch as every person dealing with such agents must, as is well settled, be presumed to know the extent of powers which the charter confers.

The position, then, occupied by some of my associates is

this: They admit that the shareholders in a corporation have a right to restrain the directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect if made; and yet they hold that the directors are liable, not in their individual, but in their corporate capacity, to the party with whom the contract is made, for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators; the latter constitute the corporation. Hence, by the two propositions just stated, it is maintained that the corporators have a legal right to enjoin the representatives against the performance of a contract which they themselves are legally bound to perform; in other words, they are liable for damages because their representatives have not performed a contract which they had a right to restrain those representatives from performing. This can hardly be. It would seem to be a legal impossibility. One or the other of these propositions must, I think, be false. Either it must be denied that the shareholders can invoke the aid of a court of equity to prevent the performance of a contract entered into by the directors, which the charter does not authorize—a principle established by numerous authorities, or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are not presumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers. But the contrary is the rule in respect to both. It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust, and nothing more, the corporation is not bound by them. This, however, is not the ground upon which I have been endavoring to maintain that corporations are exempt from liability upon their contracts which are *ultra vires;* nor is the ground upon which such defenses have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall, therefore, proceed further to show from the authorities that such contracts are illegal and

void for public reasons, entirely irrespective of the fact that they constitute breaches of trust toward the shareholders.

I shall cite but one additional case belonging to the first of the above classes; viz., *Winch v. Birkenhead, Lancashire and Cheshire Junction Railway Company* (13 Eng. Law and Eq., 506.) That was a suit in equity brought by a shareholder to restrain the corporation from entering into an agreement which amounted to a lease of the defendants' road to the London and Northwestern Company. The Vice-Chancellor, Sir J. PARKER, in disposing of the case, used the following language: "It seems to me that it is not a question of simple incapacity on the part of the London and Northwestern Railway Company to undertake the working of this line, but that it is *against the policy* of these acts of Parliament; and I think, therefore, that the agreement for making over this property to them is an agreement *savoring of illegality*, which any shareholder in the Birkenhead Company has a right to come to the court to restrain."

The cases thus far noticed were all cases between the shareholders and the directors of the corporation, in which, of course, the question as to the liability of the corporation to third persons could not arise, and they have been referred to chiefly for the uniform *dicta* they contain, asserting the illegality of all unauthorized corporate contracts. I shall now refer to a class of cases in which the question of the liability of the corporation upon such contracts was directly involved.

The first case of this class, to which I will call attention, is that of *The East Anglian Railways Company v. The Eastern Counties Railway Company* (7 Eng. Law and Eq., 505). That was a suit upon a contract made by the directors, and the defense was that the contract was not warranted by the charter, and the court so held. JERVIS, CH. J., speaking of the class of cases to which I have previously referred, says: "The cases in equity which have been cited, proceeded upon this view of the subject and were decided, not because the particular act restrained by injunction was a *breach of trust*, but because it was not within the scope of the directors' authority, was not justified by the statute, and was, therefore, *illegal*." Again, he says: "If the contract is illegal, as being contrary

to the act of Parliament, it is unnecessary to consider the effect of dissenting shareholders." This is a most explicit and emphatic judicial affirmation of the precise doctrine for which I contend, by the Court of Common Pleas in England, in a case in which there was no dissent.

The same doctrine has been held in several later English cases. Upon an application in *The Great Northern Railway Company v. Eastern Counties Railway Company* (12 Eng. Law and Eq., 224), for an injunction to restrain the defendants from interfering, contrary to an agreement between the parties, to obstruct the plaintiffs in their use of a part of the defendants' road, which was opposed on the ground that the agreement was *ultra vires*, the Vice-Chancellor said: "If, therefore, this cause had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of the court to interfere to some extent by injunction; but I think *there lies at the root of this case a question of public policy*, which precludes the interference of the court." These two cases were directly upon the point, and they show the opinion of the Court of Common Pleas and the Court of Chancery.

The next case to which I shall refer; viz., *McGregor v. The Official Manager of the Deal and Dover Railway Company*, (16 Eng. Law and Eq., 180), was in the Court of Exchequer Chamber. It was an action at law to recover damages for the breach of a contract; and the defense was, that the contract was *ultra vires*. The judgment of the court was delivered by Baron ALDERSON, who said: "The Solicitor-General argued that this promise of the defendant was in truth a promise that the South Eastern Company should do an *illegal* thing, and that the promise was, therefore, void; and we are of that opinion. This is not like the promise of a party that an act *impossible* to be done shall be done by the defendant, or by some third person; but it is a promise that an act shall be done contrary to the *public law* of the country, of which both parties are bound to take notice. The act is, therefore, *illegal*, and the promise that it should be done is a void promise." The contract concerning which this was said, was illegal in no other sense than that it was *ultra vires*.

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In the subsequent case of *South Yorkshire Railway v. Great Northern Railway Company*, in the Court of Exchequer (9 Exch. R., 55), where the questions were, 1. Whether the contract upon which the suit was brought was authorized; and, 2. If not, whether that constituted a defense—the court gave judgment for the plaintiff, on the ground that the defendants, in entering into the contract, had not exceeded their corporate powers. But no doubt seems to have been entertained that the contract, if *ultra vires*, would have been void. Barons MARTIN and PARKE expressly so held; and no opinion to the contrary was intimated by the other judges. It is true that Baron PARKE, at the close of his opinion, says: "I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants' company of the solemn contract into which they have fairly entered, and from which they are trying to escape." He had, however, previously laid down the rule as follows; "But where a corporation is created by an act of Parliament, for particular purposes, with special powers, then, indeed, another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear, by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*."

Sir William ERLE, one of the justices of the Queen's Bench, appears to be the only one of all the English judges who ever entertained any serious doubts upon the question. In *The Mayor, etc., of Norwich v. The Norfolk Railway Company* (30 Eng. Law and Eq., 120), where the question arose, he combated the doctrine; contending that in all those equity cases in which corporations had been restrained at the instance of the shareholders from entering into certain engagements, the court had proceeded solely upon the ground that the contracts, if made, would have amounted to a breach of trust, and insisted that the contracts of corporations were only void at law when expressly prohibited. But in the same case Lord CAMPBELL and Mr. Justice COLERIDGE expressed their entire concurrence in the previous decisions.

The question was finally carried to the House of Lords in

the case of *Eastern Counties Railway Company v. Hawks* (35 Eng. Law and Eq., 8), and although the contract in that case was held to be within the powers of the corporation, and, therefore, binding, it was, nevertheless, expressly and fully conceded that, if it had been *ultra vires*, it would have been illegal and void.

Lord Chancellor CRANWORTH, after citing the cases of the *East Anglian Railways Company v. The Eastern Counties Railway Company*, and *McGregor v. The Official Manager of the Deal and Dover Railway Company* (*supra*), said: "I have referred to those cases; and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think the present case comes within the principle upon which the decisions have rested." Lord CAMPBELL, in the same case, fully assents to the doctrine, and yet this case is cited and relied upon to support the views of those of my associates who differ with me upon this question. But it will be found upon examination that even Lord ST. LEONARDS, upon whose remarks they particularly rely, himself concedes the rule. He said: "The opinion of some of the judges in the Norwich case (*Mayor of Norwich v. The Nolfolk Railway Company*, *supra*), favor the disposition which I feel to restrain the doctrine of *ultra vires* to *clear cases* of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into." To this I agree. So far from denying the principle for which I contend, it concedes it. He afterwards says, speaking of two cases decided by the House of Lords at the same session: "They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the object of their acts, and which cannot *clearly* be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their *deed of manage-*

ment." In this extract the judge again recognizes the doctrine, but insists that it should be made clearly to appear that the contract is *ultra vires* before it is applied. His last remark evidently refers to the class of cases already noticed, in which the defense is not that the directors in making the contract exceeded the statutory powers of the entire corporation, but only the powers conferred by the deed of settlement. Those cases, as we have seen, have no bearing upon the question under discussion.

This view of the case in England leaves no doubt upon this subject there. The question has been before every judge and every court, has been presented in every possible form, and argued by men of the highest talent, and the result has been uniformly the same. If it is possible to settle this question by authority, this must settle it at least in that country.

I shall content myself with a brief reference to the American cases, beginning with those in this State. The question was directly presented to, and decided by, the Supreme Court in the case of *Stafford v. Wyckoff* (1 Hill, 11). The action was against the defendant, as president of a bank organized under the general law of 1838, upon a bill of exchange or draft drawn by the bank, upon the North American Trust and Banking Company, in favor of one Dodge and indorsed by the plaintiff. It was held in this case, 1st, that the bank had no authority to issue drafts on time; and, 2d, that this constituted a good defense to the action. This case was prior to the entire series of English cases to which I have referred, and yet our court, without any of the light thrown upon this subject by those cases, placed its decisions upon grounds, which the courts at Westminster, after the most elaborate discussion and examination, have fully confirmed. The opinion of the court was delivered by Mr. Justice COWEN, who says: "True, there is no nullifying clause in the statute against negotiable notes and bills, in whatever way or form issued, nor any positive prohibition or negative against them. But both are most obviously implied, not only in the general frame and scope of the statute, but more emphatically in its policy." In this sentence the judge met the argument that a contract which is merely unauthorized but not prohibited is not illegal. Another

argument is answered by the following remark: "We admit the defense is an ungracious one, both as to Dodge and the drawers; it is not however *for their sake*, but for that of the statute *and the public*, that we feel constrained to give full scope to their defense. There would be more difficulty in sustaining it, as to the indorser, were it not to be regarded as an obvious attempt by all parties to violate a principle of public policy."

Here, then, *in limine*, we have the doctrine placed in this State, upon grounds which subsequent repeated examination have shown to be just. It is true that this case was reversed by the late Court of Errors (4 Hill, 442). But as this reversal proceeded upon the ground, that the bank had power to issue the draft, it in no manner impairs the authority of the decision of the Supreme Court upon the point we are considering. Indeed, the Court of Errors itself confirmed the doctrine in the subsequent case of *McCullough v. Moss* (5 Denio, 567). Of the other cases in this State I will only notice those in this court, the most marked of which is the case of *Levitt v. Palmer* (3 Comst., 19). This was an important case, and was elaborately argued. The suit was brought by a receiver of the company, and its object was to cause to be set aside and canceled, forty-eight promissory notes of 1,000*l.* each, issued by the North American Trust and Banking Company, upon the ground that they had been issued contrary to the provisions of the act of May 14, 1840. The question, therefore, was directly involved, whether a corporation can avoid its own contract by showing that it was made in contravention of the provisions of a public statute; and the report of the case shows that this question was distinctly presented and argued by the counsel. It was held unanimously by the court, that the notes having been issued in violation of the act, were illegal and void, and could not be enforced against the company.

There is this distinction between that case and the present. That the contract which the company entered into was expressly prohibited; here it is prohibited by implication merely. But the case to which I have referred shows that this does not change the rule. The decisions in those cases all rest upon

the ground that the contracts being within the implied prohibition of the statute were void as made in contravention of the policy of the law.

No such distinction, however, exists between the case under consideration, and that of *Talmage v. Pell* (3 Seld., 328). That case involved the validity of three several contracts of the North American Trust and Banking Company, a corporation organized under the general banking law of this State; viz., 1, a contract to purchase a large amount of State stocks of the State of Ohio; 2, certain certificates of deposit or promissory notes issued by the company in payment for the stocks; and 3, an assignment of a certain bond and mortgage as security for the notes. Neither of the contracts was expressly prohibited by any law. The only objection to them was that they were not authorized by the act under which the company was incorporated, and this court held the contracts to be illegal and void upon that ground.

These cases show that in this State the late Supreme Court and Court of Errors, and this court, have all concurred in holding, in accordance with the numerous English cases to which I have referred, that the contracts of corporations which are *ultra vires* are void and cannot be enforced. Similar decisions have been made by the courts of other States and of the United States. *The Pennsylvania and Delaware Canal Company v. Dandridge* (8 Gill. & John., 248); *Hood v. The New York and New Haven Railway Company* (22 Conn., 502); *Elmore v. The Naugatuck Railway Company* (23 Id., 457;) *Mutual Savings, etc., v. The Meriden Agency Company* (24 Id., 159); *The Naugatuck Railway Company v. The Waterbury Button Company* (Id., 468); *Bank of Michigan v. Niles* (1 Doug., Mich. R., 401); *Orr v. Lacey* (2 Id., 254); *Root v. Goddard* (3 McL., 102); *Root v. Wallace* (4 Id., 8); *Dodge v. Woolsey* (18 How., U. S. R., 331); *Pearce v. Madison and Quincy Railroad Company*, and *Peru and Quincy Railroad Company* (21 Id., 441). I shall not consume time and space by referring to these cases particularly. If principles can ever be settled by authority, if the slightest respect is due to the opinions of other tribunals, it would seem that no

court could resist the overwhelming weight of the decisions which have been cited.

The strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract and thus shields himself from responsibility upon it, as to that of a corporation. If it be said that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either, this is equally true in respect to unauthorized contracts of corporations. Their powers are prescribed by statute, and every one who deals with them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, as when the want of power is not apparent upon the face of the statute, but depends upon the existence of some extrinsic fact known to the corporation, but not to the party dealing with it, it has been already conceded that the corporation would be estopped from setting up that its contract was *ultra vires*.

But the injustice which can ever accrue to individuals from permitting the defense in question, is trifling under the law as now settled, compared with the importance to the public of keeping corporations within their chartered limits. It has been repeatedly held by this court that where corporations, by means of contracts or engagements prohibited by law, *i. e.*, which are authorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may, nevertheless, be compelled, in a suit brought in disaffirmance of contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the State, it at the same time protects individuals from any gross injustice.

My conclusion, therefore, is that the contract of the defendants to transport the plaintiff from Chicago to Toledo was

illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was *ultra vires* and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from a responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon this contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars when crossing the railroad track. The duty to observe care in these cases arises, not upon contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants.

It will scarcely be doubted that if the defendants' cars, through the carelessness of their employes, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to

run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee unauthorized and contrary to law, is, nevertheless, to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that, at least, in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general towards persons sitting in their cars, but whom they have made no contract to transport. This must depend upon the circumstances under which the individuals had entered the cars. If they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars, was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of *Nolton v. The Western Railroad Corporation* (15 N. Y., 444), that when a railroad company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation; yet this can make no difference, as the liability

in such cases arises, not from any contract expressed or implied, but from the universal obligation to all persons to avoid injury to others through their negligence.

Suppose, while standing upon your own premises, you accidentally, but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company, with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of the company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injuries sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that where the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence, for the party injured, the former is only liable for gross negligence; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants? To this question there can be but one answer. The defendants can never allege that the plaintiff was in their cars as a trespasser, when he was in there by their express assent. The contract between him and the company, it is true,

for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the plaintiff to leave the cars; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff, by consenting to travel in the defendants' cars, became a participator in their unlawful conduct, and, hence, is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case, is a law of restriction upon the defendants and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from traveling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent, and may have relief against the more guilty party even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party, *a fortiori* may he claim redress for injuries subsequent upon their *tortious* acts. He is so far regarded as *particeps criminis* that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time, or to transport him at all, whatever damages he might thereby sustain; but he cannot be said, like an outlawed felon, to have *caput lupinum*, and thus be liable to be knocked on the head like a wolf or to have his limbs broken with impunity. (4 Bl. Com., 320.) Upon these grounds I think the recovery was right, and that the judgment should be affirmed.

CLERKE, J., delivered an opinion for affirmance on the ground last stated by SELDEN, J.

DENIO, J., was for reversal. All the other judges were for

affirmance, but without passing upon the questions discussed by COMSTOCK, CH. J., and SELDEN, J.

JUDGMENT AFFIRMED.

NOTES.

Ultra vires has no application to wrongs done in excess of authority.—The general principles of the law of agency, that the principal is liable in a civil suit to third persons for the frauds, deceits misrepresentations, concealments, negligences and other torts of his agent, in the course of his employment, although the principal did not authorize or know of such misconduct, or even if he disapproved of or forbade the wrongful acts, is equally applicable to corporations, and their agents or servants. Neither is the liability, in such cases, affected by the fact that the acts done are not within the powers of the corporation, if the acts are such as come within the scope of the powers attempted to be conferred upon the agents.

In *New York & New Haven Railroad Company v. Schuyler*, 34 N. Y., 30, DAVIS, J., observes: "A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and it will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers, the wrongful transaction or act may be." See, also, *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend., 31; *Goodspeed v. East Haddam Bank*, 22 Conn., 541; *Green v. London Omnibus Co.*, 7 C. B. (N. S.), 290; *Frankfort Bank v. Johnson*, 24 Me., 490; *Philadelphia & Baltimore R. Co. v. Quigley*, 21 How. (U. S.), 202.

It is further remarked by Judge DAVIS, in applying the foregoing proposition to the case before the court: "It follows from this proposition that if it were established in this case that the corporation itself issued the false certificates of stock and permitted the fraudulent transfers of spurious stock, it would be liable to the party directly deceived and injured by the transaction. The incapacity to create the spurious stock would be no defense to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer a fraud and deceit, would itself be the cause of the injury and the basis of a recovery. No court would hear the corporation assert that its wrongful act was beyond its chartered powers, and, therefore, ineffective to charge it with the injurious consequences of the fraud. But in this case the false certificates were issued and the spurious stock transferred by an officer of the corporation. A corporation aggregate being an artificial body, an imaginary person of the law, so to speak, is, from its nature, incapable of doing any act except through agents to whom is given by its fundamental law, and in pursuance of it, every power of action it is capable of possessing or exercising. Hence

the rule has been established, and may now also be stated as an indisputable principle, that a corporation is responsible for the acts or negligence of its agents while engaged in the business of the agency to the same extent and under the same circumstances that a natural person is chargable with the acts or negligence of his agent." See, also, *Ranger v. The Great Western R. Co.*, 5 H. L., 86; *Thayer v. Boston*, 19 Pick., 511; *Nolton v. Western R. Co.*, 15 N. Y., 444; *Denny v. Manhattan Co.*, 2 Den., 118; *Kortright v. Buffalo Com. Bank*, 20 Wend., 94; *Davis v. Bank of England*, 2 Bing., 393; *Smith v. Rathburn*, 66 Barb., 402; *Brown v. South Kennebec Ag. Soc.*, 47 Me., 275; *Railway Company v. Anthony*, 43 Ind., 183; *Harlam v. Emmert* 41 Ill., 320; *Pittsburgh, etc., R. Co. v. Slusser*, 19 Ohio St., 157; *Atlantic, etc., R. Co. v. Dunn*, Id., 162; *Hutchinson v. Western, etc., R. Co*, 6 Heisk. (Tenn.), 634; *Hooker v. New Haven & Northampton Co.*, 15 Conn., 321; *Yarborough v. Bank of England*, 16 East., 6; *Mackay v. Collonial Bank*, L. R., 5 P. C., 394; 30 L. T. (N. S.), 180, 43 L. J. P. C., 31; 22 W. R., 473.

A corporation may be liable for assault and battery, libel, and other torts.—An action will lie against a corporation for an assault and battery, committed by its agent, acting within the scope of his authority. *Philadelphia & Reading R. Co. v. Derby*, 14 How., 486; *Moore v. Fitchburg R. Co.*, 4 Gray, 465; *Ramsden v. Boston, etc., R. Co.*, 104 Mass., 117; *Brokaw v. New Jersey, etc., R. Co.*, 32 N. J. (Law.), 328; *Vanderbilt v. The Richmond Turn. Co.*, 2 Coms., 479; *Isaacs v. Third Av. R. Co.*, 47 N. Y., 122; *Shea v. Sixth Av. R. Co.*, 62 N. Y., 180.

A corporation has the capacity to publish a libel, and may be liable in damages therefor. *Philadelphia etc., R. Co. v. Quigley*, 21 How., 202; *Maynard v. Firemans' Fund Ins. Co.*, 34 Cal., 48; 47 Id., 207; *Whitfield v. South Eastern R. Co.*, 1 E. B. & E., 115. So it may be held responsible for a malicious prosecution. *Vance v. Erie R. Co.*, 32 N. J. (Law.), 334; *Goodspeed v. East Haddam Bank*, 22 Conn., 530. And for a nuisance. *Terre Haute Gas Co. v. Teel*, 20 Ind., 131. And, also, in an action of trover. *Wolf v. Boettcher*, 64 Ill., 316.

CHAPTER IV.

CORPORATE LIABILITY FOR MONEY LOANED TO AID UNAUTHORIZED ACTS.

EIGHTH SELECTED CASE.

BRADLEY v. BALLARD.*

1. CONTRACTS—*by private corporations, whether enforcible when not within their proper powers to make them.* While it is true that so long as the terms of a contract remain unexecuted on both sides, a private corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced against it, for the reason that if thus estopped, its powers might be indefinitely enlarged; yet, such a corporation cannot, under cover of this principle, evade the payment of borrowed money on the ground that, although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality.
2. While a contract remains executory, not only is it true the powers of the corporation cannot be extended beyond its proper limits for the purpose of enforcing the contract, but, on the application of a stockholder or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*.
3. So, too, if a contract *ultra vires* is made between the corporation and another person, and while it is wholly unexecuted the corporation recedes, the other contracting party would, probably, have no claim for damages.
4. But if such other party proceeds in the performance of the contract, expending money and his labor in the production of values which the corporation appropriates, the corporation can never be excused from payment on the plea that the contract was beyond its power.

* Reported in 53 Ill., 413 (1870).

5. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of its charter, they are equally inclined, on the other hand, to enforce against private corporations contracts, though *ultra vires*, of which they have received the benefit.

6. And if such corporations, to increase their profits, embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority.

7. MUNICIPAL CORPORATIONS, however, stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers cannot be made binding upon the tax-payers, from the presumed assent of the latter.

Appeal from the Circuit Court of Cook County; the Hon. Erastus S. Williams, Judge, presiding.

THE opinion states the case.

Mr. Chief Justice LAWRENCE delivered the opinion of the court.

This was a bill in chancery, brought by Bradley against Ballard and others, for the purpose of enjoining the prosecution of a suit pending in the Circuit Court of Cook county, against a corporation called "The North Star Gold and Silver Mining Company," in which complainant was a stockholder, upon certain promissory notes given by said company, and also to cancel certain other notes not yet in suit. The court sustained a demurrer to the bill, and, the complainant not asking to amend, a decree of dismissal was entered.

It appears by the averments of the bill that various persons associated themselves together in the city of Chicago, in the year 1866, and filed their articles of organization in the Circuit Court of Cook county, under the general incorporation law, whereby they became incorporated under the title above stated. The statute requires the certificate to state the town and county in which the operations of a company thus incorporated are to be carried on, and the certificate of this company stated that their operations were to be carried on in the city of Chicago, in the county of Cook, and State of Illinois. It

further appears from the bill that the company thus organized engaged in mining in the Territory of Colorado, and in the prosecution of that work borrowed large sums of money, for which the notes described in the bill were given, except some that are alleged to have been given for official salaries. It is not claimed that they were not given for a full and fair consideration, but their cancellation is sought upon the ground that they were given for money borrowed to enable the company to prosecute a business which it had no power to prosecute, and that this purpose was known to the lenders of the money. It is insisted that, although the business of the corporation was mining, yet, by the terms of its certificate, it had no power to prosecute that business beyond the limits of the city of Chicago, or certainly not beyond the limits of the State.

Whether this is the proper construction of the statute, is a question we do not find it necessary to decide. Conceding that it is, and that this corporation had no power to engage in mining in Colorado, we are still of opinion the complainant has not, by his bill, entitled himself to relief. He became a stockholder to the extent of $25,000, and from the name and character of the company, he must have known it was organized for the purpose of mining beyond the limits of this State. He subsequently became one of the directors of said company, and it is a legitimate inference from the bill that at least a part of these debts were created while he was thus participating in the control of the company. There is no pretense in the bill that he ever, in any mode, objected to the mining operations of the company in Colorado, or to the borrowing of money therefor, and the fair, and, indeed, unavoidable inference, from the nature of the company, the connection of the complainant with it, and the silence of the bill in this regard, is, that he did not object. On what ground, then, can he ask a court of equity to enjoin the collection of these notes?

It is said by counsel for complainant that a corporation is not estopped to say, in its defense, that it had not the power to make the contract sought to be enforced against it, for the reason that if thus estopped its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true, but when under cover of this

principle a corporation seeks to evade the payment of borrowed money on the ground that, although it had the power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality.

Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true it would be an insuperable objection to the application of the doctrine even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act, *ultra vires*, has been accomplished. But while a contract remains executory it is perfectly true that the powers of corporations cannot be extended beyond their proper limits, for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power.

Take, for example, the case of a corporation chartered to

build a railway from Chicago to Rock Island. Under such a charter the company would have no power to build steamboats for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway, could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that instead of having a vessel built by a contractor it employs a superintendent to build it and hires mechanics by the day, could it escape payment of their wages on the ground that it had employed them in a work *ultra vires?*

In cases of such a character, courts simply say to corporations, you cannot in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.

We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. This is demanded by the plainest principles of justice. 2 Kent, 11 Ed., p. 181, note; *Zabriskie v. C. C. & C. R. R. Co.*, 23 How., U. S., 381; *Bissell v. The Michigan Southern & Northern Indiana Railroad Companies*, 22 N. Y., 258; *Carey v. Cleveland & Toledo R. R. Co.*, 29 Barb., 35; *Parish v. Wheeler*, 22 N. Y., 490; *Groff v. Am. Lin. Th. Co.*, 21 N. Y., 124; *Argenti v. San Francisco*, 16 Cal., 225; *McCluer v. Manchester & L. R.*, 13 Gray, 124; *Chapman v. R. & L. R. R. Co.*, 6 Ohio,

137; *Hall v. Mut. Fire Ins. Co.*, 32 N. H., 297; *Railroad Company v. Howard*, 7 Wall., 413.

If the complainant in this case had, as a stockholder, asked a court of chancery to enjoin this corporation from mining in Colorado, it would have examined the charter, and if it had arrived at the conclusion that such mining was beyond the powers derived from filing the certificate in question, under our statute, would have issued the injunction. But this he did not do. On the contrary, he has participated in the work, and so long as there was hope of gain, he was willing the money should be borrowed by which the work was to be carried forward. The borrowing of the money was not, in itself, an act *ultra vires*, nor was the giving of the notes. Money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a purpose, which, whether *ultra vires* or not, was unquestionably the sole purpose for which the corporators associated themselves together, and for which this complainant became a stockholder. Justice requires the corporation to repay the money it has thus borrowed and expended.

What we have said applies only to private corporations, organized for pecuniary gain. If, to increase their profits, they embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers where they transgress the limits of their chartered authority. But municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers cannot be made binding upon the tax-payers, from the presumed assent of the latter.

There are some vague charges in the bill of a conspiracy between the holders of the notes upon which the suit has been brought and some of the directors, but no facts are alleged showing, or tending to show, any wrongful or fraudulent intent. The alleged conspiracy seems merely to an be understanding between the holders of the notes and the majority of

the directors, by which the latter will allow the former to obtain a judgment on their notes, and we do not perceive why they should not. If the complainant has had the misfortune to associate himself with persons of less pecuniary responsibility than himself, for the purpose of carrying on a hazardous business in which heavy debts have been incurred, it is a misfortune of which the courts cannot relieve him, merely on a vague and general charge of conspiracy against his fellow stockholders or directors. No facts are alleged in this bill which can be made the foundation of relief.

As before remarked, the counsel of appellant has presented his case simply on the question of corporate power. We are of opinion the demurrer was properly sustained to the bill.

DECREE AFFIRMED.

Mr. Justice SCOTT dissents.

LIABILITY FOR MONEY EXPENDED IN THE EXECUTION OF ULTRA VIRES CONTRACTS.

NINTH SELECTED CASE.

THE STATE BOARD OF AGRICULTURE v. CITIZENS' STREET RAILWAY COMPANY.*

It is the general doctrine that corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others; yet although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation, or of any statutes prohibiting it, and the corporation has, by its promise, induced a party relying upon such promise and in execution of such contract to expend money and preform his part of the contract the corporation is liable on the contract.

From the Marion Common Pleas.

DOWNEY, J.—The question presented for our consideration and decision in this case is, whether the complaint to which

*Reported in 47 Ind., 407 (1874).

the demurrer was sustained in the court below is sufficient or not. The action was commenced November 21, 1868.

The complaint alleges that the Citizens' Street Railway Company was, and is, a corporation owning and running a street railway in the city of Indianapolis, Indiana, and to Crown Hill, etc.; that two of the streets on which cars are run extend to near the north boundary of the city, and one of the routes three miles beyond and near the grounds set apart for the holding of state fairs by the said State Board of Agriculture, a corporation having its principal office in Indianapolis; that the holding of said fairs is a source of great profit to the said street railway company; to-wit., to the amount of six thousand dollars at each fair, etc.; that, for the purpose of increasing the profits of said street railway company, and to further its interest the said company desired to procure the said State Board of Agriculture to hold state fairs upon the ground near the northern boundary of the said city, although it would occasion expense to the said Board of Agriculture; and for that purpose the said company, with the approval of the stockholders, in March, 1868, entered into an agreement with the plaintiffs, in writing, etc., as follows:

"As an inducement to the Indiana State Board of Agriculture to locate the annual state fair upon the State Board of Agriculture's fair ground, north of the city of Indianapolis (Camp Morton), for each of the years 1868, 1869, 1870, each of the undersigned hereby agrees to pay to the said State Board of Agriculture the amount set opposite his name, to be paid in three equal annual payments, on the first day of September, 1868, 1869, 1870, each of the subscribers to be responsible to the amount of his own subscription, but no farther; and subscriptions are upon the express condition that the state fair shall be located and held for the three years above stated. Said amounts to be paid without benefit from valuation laws.

"March 18, 1868.

"Signed: Citizens' Street Railway Company, one thousand dollars."

The said plaintiff, not doubting the power of said railway company to make said subscription and contract, has per-

formed all the conditions in said contract to be performed by her up to this time, and on the faith of said subscription by said company and others, expending twenty thousand dollars in fitting up said grounds. Yet the defendant has not paid, but wholly refuses to pay, her one-third of one thousand dollars due September 1, 1868, by the terms of said agreement, although demanded, etc., to the plaintiff's damage six hundred dollars; wherefore, etc.

There are three acts relating to street railways. The act of June 4, 1861, Acts Special Session, p. 75; the act of March, 6, 1865, Acts, 1865, p. 63, and the act of February 28, 1867, Acts, 1867, p. 162.

To these acts we must look to ascertain the extent and powers and capacities of the appellee.

The first section of the act of June 4, 1861, authorizes the formation of a corporation of this character, "for the purpose of constructing, owning, and maintaining street or horse railways, switches, or side-tracks, upon and through the streets of the cities or towns within the State.

The third section provides: "The said company shall be capable of purchasing, holding and conveying any real or personal property whatever necessary for the construction and equipment of the road, switches and side-tracks, and for the erection of all necessary buildings and yards, and may buy, own and sell any kind of property that may be necessary to properly conduct or carry on the business of such road."

Section 6 of the same act authorizes the company to "borrow such sums of money as may be necessary for completing and operating their railroad," and authorizes the corporation to raise the money by issuing bonds, secured by a mortgage of its corporate property and franchises.

The act of March 6, 1865, authorizes such companies to extend their roads beyond town and city limits, and authorizes them to use public highways, upon the conditions and subject to regulations therein prescribed.

The act of February 28th, 1867, authorizes such companies to raise funds to discharge the indebtedness of such companies, by making a *pro rata* assessment against stockholders, and to make needful rules in relation thereto, etc.

The objection to the complaint urged by counsel for the appellee is, that the contract on which the action is founded is void for the want of power in the street railway company to make the same.

The modern doctrine is to regard corporations as possessing the powers expressly conferred upon them by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others.

The state fair has generally been held at Indianapolis, though not always. The State Board of Agriculture owned the ground on which the fair was afterwards located under the contract in question. If that place was made the location for the fairs, it was so near the city that the street railway company, by making a short additional line of road, could connect the fair ground with its whole system of roads in the city; could obtain the carrying of passengers from all parts of the city into which its road extended, convey them to the fairs, and return them to the city again, thus making the arrangement one of great profit to the company.

Counsel say: "There is nothing in the charter of the appellee that warrants the assumption that it is authorized to embark in the enterprise, however praiseworthy it may be, of developing the agricultural and mechanical interests of the State by aiding in establishing and maintaining State and county fairs, or any of the other plans that may be suggested by the ingenious and public spirited. It will be difficult to imagine anything more foreign to the objects for which the appellee was incorporated than the exhibition of live stock, agricultural productions, and mechanical implements, and the giving of premiums to successful competitors for excellence."

We hardly think the motive with the street railway company was the development of the agricultural and mechanical interests of the State, so much as it was to build up, increase, and make more profitable the business in which it was engaged; that this latter was the object which it had in view, we think is quite clear.

Counsel for the appellant submit: That the contract on which the action is predicted is within the incidental powers of the corporation; that it has the power to make all contracts

necessary and usual as means to carry out the objects of its creation, unless prohibited by law; that with this limitation it may deal precisely as if it were a natural person, to promote its legitimate objects. It is urged that it is usual for railroad companies to aid in establishing picnic and camp-meeting grounds, etc., on their lines, as means of increasing the business of their roads, and making money for the company, and that a corporation is estopped to plead *ultra vires* when money has been invested on the faith of its contract.

Without deciding the law of the first position assumed by counsel for the appellant, we have examined more particularly the law with reference to the second.

A distinction may, perhaps, be well made between the case where an act of a corporation is done in violation of an express prohibition in its charter, or in some other law relating thereto, and the case where there is simply a defect of power in the corporation to do the act. So it appears that there are acts of corporations which are strictly *ultra vires*, and for the doing of which the State may proceed against the corporation, and yet the acts of the corporation, under the particular circumstances, be binding upon the corporation.

There appears also to be a distinction between the rights of the parties to a contract which remains wholly executory, and the rights of parties to a contract when it has been wholly executed by the parties dealing with the corporation.

In Angel & Ames Corp., 240, note *a*, 9th Ed., it is said: "The courts of New York have gone very far in enforcing contracts made by corporations, although they are not justified by their charters; and the law in that State now appears to be that such a contract, which is purely executory on both sides, and where no wrong will be done if the parties are left in their previous situations, should not be enforced, but that the executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require. *Parish v. Wheeler*, 22 N. Y., 494; *Bissell v. The Michigan Southern & Northern Indiana Railroad Companies*, 22 N. Y., 258; *De Groff v. Amer. L. Thread Co.*, 21 N. Y., 124.

In Sedgw. Stat. & Const. Law, 73, 2d Ed., it is said: "It

must be further borne in mind, that the invalidity of contracts made in violation of statutes, is subject to the equitable exception that, although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains. And the principle of this exception has been extended to other cases. So, a person who has borrowed money of a savings institution upon his promissory note secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description."

In *Township of Pine Grove v. Talcott*, 19 Wall., 666, this statement of the law is copied into his opinion by SWAYNE, J., and, although the case was decided upon another point, it was stated by the learned judge, that "the authorities referred to sustain the text."

The Steam Navigation Company v. Weed, 17 Barb., 378, was an action to recover money loaned, and the defense was, that the corporation had no power to loan the money, and it was held that the defendant was not at liberty to avail himself of the defense. The court drew a distinction between the violation of an express statute and the mere want of power to make the contract. The doctrine was stated as laid down by Mr. SEDGWICK above. The learned judge, after examining a number of authorities, concludes his opinion as follows:

"I am happy to come to the conclusion that the law will not sustain this most unconscionable defense. It ill becomes the defendants to borrow from the plaintiff one thousand dollars for a single day, to relieve their immediate necessities, and then to turn around and say, 'I will not return you this money because you had no power by your charter to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the

State of Connecticut the extent of the plaintiff's chartered privileges. We shall lose our respect for the law when it so far loses its character for justice as to sanction the defense here attempted."

The following cases are cited and examined in the opinion, and relied upon in support of the ruling: *Silver Lake Bank v. North*, 4 Johns., Ch., 370; *The State of Indiana v. Woram*, 6 Hill, N. Y., 33; *The Chester Glass Co. v. Dewey*, 16 Mass., 94; *Steamboat Co. v. McCutcheon*, 13 Penn. St., 13; *Palmer v. Lawrence*, 3 Sandf., 161; *Potter v. The Bank of Ithica*, 5 Hill, N. Y., 490; *Suydam v. Morris Canal and Banking Co.*, 5 Hill, N. Y., 491, note *a*; *The Sacket's Harbor Bank v. The Lewis County Bank*, 11 Barb., 213.

We refer, in support of the rule, to the following additional authorities, which we have examined: *Mott v. The U. S. Trust Co.*, 19 Barb, 568; *Bank v. Hammond*, 1 Rich., 281; *Southern, etc., Co. v. Lanier*, 5 Fla., 110; *The San Francisco Gas Co. v. The City of San Francisco*, 9 Cal., 453; *Argenti v. City of San Francisco*, 16 Cal., 255; *Little v. O'Brien*, 9 Mass., 403.

It is not claimed in the case under consideration that there was any statute by which the street railway company was prohibited from entering into the contract in question, or in other words, that in making the contract that company violated any statute by which the act was prohibited. All that is claimed is that there was a want of power on the part of the corporation to bind itself by the contract. It is fully shown on the part of the plaintiff that the State Board of Agriculture performed the contract on its part. The street railway company has thus received the benefits and advantages of the contract, but seeks to avoid paying the consideration promised, because it had not the legal power to contract for the benefits which it has actually received. In our opinion the street railway company is not at liberty to assume this position. It has received the profits resulting from the compliance of the plaintiff with the contract. These profits, we are at liberty to presume, have gone to swell dividends of the stockholders in that corporation. It would be unjust for their company now to escape performance of the contract by which these profits have been

realized. We have not examined to see what the present state of the law is on this subject in the English courts. We have considered the case without reference to the allegation in the complaint that the contract was made with the assent of the stockholders of the street railway company. If the street railway company has incurred a forfeiture of its chartered rights by the act done that is a question for it to settle with the State.

No question is discussed or decided relating to the validity of the contract, except so far as relates to the power of the street railway company to bind itself thereby under the circumstances. The judgment is reversed with costs, and the cause remanded for further proceedings.

BUSKIRK, C. J., dissents.

NOTES.

Reasons in support of the doctrine in the foregoing cases.—The opinion of the court in *Bradley v. Ballard*, is, in our judgment, an able exposition of the law of *ultra vires*, in several of its aspects, and especially in its application to contracts fully executed on one side, or under which the corporation has received and appropriated the benefit of them. But the observation of the learned judge, that "municipal corporations stand upon a different ground," and his suggestion that the same rule would not apply to them, would, in the light of many recent decisions, and a growing tendency of the courts, seem hardly warranted, or, at least, to require some qualification. But this question will be hereafter considered. See *post*, Ch. IX.

It would appear unnecessary to add further to the arguments of the learned judge in support of his decision on the main question involved in the case, or to illustrate the injustice of the adverse doctrine; namely, that corporations may interpose the plea of *ultra vires* in suits on executed contracts. We might, however, illustrate this by the further use of the hypothetical case of the purchase of a steamboat to operate on the Mississippi River in connection with the railroad. Suppose that the railroad company, after purchasing the steamboat, and executing and delivering its note therefor to the vendor, secures a policy of insurance on the boat to the full amount of the consideration agreed to be paid for the same, and the boat being destroyed by fire, it receives this amount from the insurance company and it becomes a part of the fund from which dividends are declared, and each stockholder receives his proper proportion of the same; and, on suit being instituted by the vendor, on the note, the corporation pleads *ultra vires*, and he is defeated in his action. The injustice of the doctrine in such a case will be made manifest.

Besides, the doctrine, if applicable at all, would be available by either party. And if the vendor had received pay for his steamboat, what would prevent him from recovering the steamboat back again, on the ground that the contract was *ultra vires*, and, therefore, void. The doctrine and the argument in support of it is, that the corporation, having no power, the contract is void, and the *status* of the parties the same as if no attempt had been made to contract.

Where both parties plead ultra vires.—The case of *Parish v. Wheeler*, 22 N. Y., 494, presents this strange anomaly. A railroad company purchased a steamboat and other vessels to run in connection with its railroad, and the plaintiff advanced a portion of the money to pay for the same, and for the security of said money, as well as other sums due the plaintiff from said railroad company, amounting to about $14,000, the latter made a conveyance of said steamboat to a trustee, and a conveyance of certain canal-boats or barges to the plaintiff, he agreeing to reconvey the same on payment of his claim. The amount due the plaintiff remaining unpaid, the steamboat was sold to satisfy the claim, pursuant to the trust deed, for $11,500. The defendant, as trustee named in a certain mortgage executed by said railroad company, and by virtue thereof, obtained possession of the canal-boats or barges aforesaid, fourteen in number, and this action was brought to recover their value. It was found by the referee, in the court below, that the plaintiff was the owner of the said boats or barges; that the defendant wrongfully converted the property; and that the plaintiff's damages, by means of the premises, were $8,400; for which, with interest from October 23, 1855, the time of the demand of the same, judgment was rendered.

It is manifest from the opinion of the court, on the appeal in this case, that both parties attempted to apply the doctrine of *ultra vires* to defeat the other; the plaintiff insisting that he should not be required to account for the proceeds of the sale of the steamboat, as the act of purchasing it was *ultra vires* and the contract void; and the defendant maintaining that the plaintiff should recover, at most, only what was legally due him, and for which the boats were given in security, and that in ascertaining this indebtedness he should not be credited with $5,396.86, the amount advanced by the plaintiff on the purchase of the steamboat, as that act was beyond the power of the corporation and *ultra vires*.

After stating that the security given the plaintiff was in the nature of a mortgage, and assuming that the amount of damages found in the court below ($8,400) was the estimated value of the boats at the time of the conversion, Mr. Chief Justice COMSTOCK, who delivers the opinion of the court, among other things, observes: "The defendant denies that the plaintiff should be credited with the sum of $5,396.86, advanced by him to pay the last of the drafts drawn for the original purchase-money of the Boston [the steamboat], and which the company had accepted. * * * This item of indebtedness the defendant proposes to reject, on the ground that the purchase of the steamer by the corporation was *ultra vires* and illegal; and he insists that the plaintiff, knowing all the facts, made this advance in pursuance and consummation of that purchase. That the plaint-

iff knew all the facts is undeniable, and the referee has, in substance so found. It should be further stated that Horton, the indorser of the draft in question, had taken it up, and that the plaintiff paid the money to him. I am clearly of opinion that the position of the defendant, in respect to this item of the account, cannot be maintained. Conceding that the company, being simply a railroad corporation, ought not, according to its charter, purchase and own a steamboat, it nevertheless did purchase one in the name of another person, and it took the possession and had the use of the property. Saving and excepting such question as might arise under the navigation laws, the company became the owner of the boat, and its title was never questioned. The vendor never repudiated the sale on any ground; and I think it would be very absurd to say that the corporation itself, or the defendant standing in its situation, can repudiate the transaction, the benefit of which was received in the manner stated. In my judgment, when a sale of a chattel made to a corporation is executed and complete in all things except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase is not to be entertained so long as it retains, and insists upon retaining, all the benefits of the contract. In this case, the chattel was not only delivered and used by the purchaser, but the vendor received all his pay for it, so that reclamation on his part, upon any ground, was out of his power. It was paid by Horton, who had indorsed it for the accommodation of the company. It would be strange if the company could not lawfully protect and reimburse their own indorser, and equally strange if, after requiring the plaintiff to make the payment for them, they can be allowed to deny that they are indebted to him on that account. If the purchase of the steamboat involved any breach of public law, the corporation alone was guilty, because all the restraints of the statute or the common law, affecting the transaction, are imposed upon it alone. There is certainly no moral turpitude if a railroad corporation buys a steamboat or builds a church; nor is there any legal turpitude. It may be in excess of power, or a private breach of trust in respect to its stockholders. The latter may complain, or the State may interpose; but corporations themselves, like individuals, in dealing with other parties must live up to the rules of common honesty."

On the claim of *ultra vires* set up by the plaintiffs he remarks: "In default of payment on the day specified the property was authorized to be sold at public auction. The company made default and the steamboat was sold at auction, pursuant to the power thus given, the 23d day of October, 1855, for the sum of $11,500. This sum, the plaintiff insists, is not to be allowed in payment or reduction of his claims under the security in question, assigning the alleged illegality of the agreement of August 4, 1854 [the agreement to advance the money on the purchase of the steamboat, etc., and to give the security aforesaid], as the only reason for this pretension. The learned referee appears to have sustained the position. * * *
The supposed illegal agreement of August 4, 1854, and the transfers of the steamer and canal-boats, made in pursuance thereof, are parts of one transaction, and, together, they constitute the mortgage which is the plaintiff's only title to the property in controversy. If the contract, therefore, was ille-

gal in such a sense that the plaintiff, having sold a part of the mortgaged property, is not accountable for the proceeds, the same illegality, I apprehend, will prevent the enforcement of the contract in his favor as to another part of the same property.

"But I am constrained to reject all the arguments on both sides of this case, founded on the alleged illegality of any of the transactions involved. Contracts with corporations made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, I am willing to agree, should not be enforced, because such contracts contemplate an unauthorized division of corporate funds, and, therefore, a breach of private trust. But the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith so require. On another occasion I have said all I desire to say on this general subject. (*Bissell v. The Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y., 262.)

"The most unfavorable statement of the particular matter now in question is that the railroad corporation, in excess of the powers conferred by its charter, purchased and paid for a steamboat and several canal-boats; that, being in possession and use of the property in connection with its regular business, it mortgaged the same property to its creditor, the plaintiffs, taking back charter parties for a limited period, and also a stipulation for a reconveyance, if the debt should be paid at the time agreed on; that the plaintiff taking the usual course in such cases caused a part of the property to be sold after a default had occurred, and received the proceeds of that sale, which nearly or quite satisfied the debt. In all this I can see nothing unlawful except the want of legal power or right to buy the property. But it was actually bought, paid for and delivered, and, therefore, became a part of the estate and assets of the company. The company could sell or pledge it to a creditor and could redeem the pledge by paying the debt. In acquiring the ownership of such property the corporation may have usurped a right not granted by its charter. But the acquisition was, nevertheless, a fact which no legal refinement can deny. * * * The security of the plaintiff was in the nature of a mortgage. * * The plaintiff actually sold a part of the property for the payment of his debt and he received the money. No one but himself questions or can question his right to make the security available in that manner. He does not pretend or suggest that he cannot hold the money thus obtained. On the contrary, he insists upon retaining it against all the world, but at the same time claims that his debt is neither paid nor reduced. Much has been said in the books (sometimes I think without reflection) about the powers of corporations and the consequences of exceeding those powers. But no authority can be found to justify the position of the plaintiff in respect to the matter here considered. I feel no hesitation in saying that the sum of $11,500 produced by the sale of the steamboat pursuant to the power contained in the mortgage, must be applied toward the satisfaction of the plaintiffs' demand."

Comments and illustrations.—It will be observed that the case of *Bradley v. Ballard*, determined some ten years later, follows this in its leading idea; namely, that as to executed contracts the doctrine of *ultra*

vires has no application. It has been observed that the plea of *ultra vires* as a defense at law in an action on contract is an "ungracious" and "indecent" one, and that in its application to executed contracts it affords a bounty to dishonesty. It has been held, as we have seen, that railroad companies may contract to carry merchandise and passengers beyond their chartered lines, and that corporate ferry companies may, when their steamboats and other vessels are not required in the chartered business, charter them or use them themselves for other purposes. But I believe there is no case where it has been held that a railroad company has authority to purchase grain on speculation, or even to embark in it for the purpose of furnishing its road with business. But we will suppose that the company embarks in such an enterprise for speculation as well as to add to the business of the road, and purchases along its line large quantities of agricultural products, and that in the execution of such speculation it buys the entire products of a farmer amounting to $5,000, for which it promises to pay him a large price on a short time. Having carried the produce to market, and realized a good profit, when the time expires the farmer demands his pay but is refused. A suit is instituted on the claim, the officers smile and plead *ultra vires*. The court holds that the farmer should have taken notice of the powers of the company; that he was bound to know that the company could not engage in speculations in agricultural products; that it would be dangerous to allow a recovery in such a case, as the usurpations would be unlimited if the courts should countenance them; and so the plaintiff would be turned out of court. This would be in harmony with the decisions in many of the early cases, based upon similar reasons. Yet how monstrous the doctrine!

Other authorities in harmony with Bradley v. Ballard.—We have heretofore observed that "courts are undoubtedly inclined to restrain acts of corporations where they are clearly *ultra vires*, and to prevent them from executing such contracts, by injunction; but, on the other hand, there is a tendency of the courts, based upon the stongest and plainest principles of justice, to enforce contracts against corporations, although, in entering into them, they have exceeded their chartered powers, where they have received the consideration and the benefit of the contracts." Am. Law Rev., July, 1879. Art., "*Ultra Vires.*"

The doctrine of the foregoing cases also finds support in the views of the court in *DeGroff v. American Linen Thread Co.*, 21 N. Y., 124. Mr. Justice BACON there observes: "If it be contended that the defendants had no power to enter into the contract of sale in this case and bind the company to perform the obligations assumed, viewed as a question of corporate power, yet having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, and in case of a corporation when seeking to escape responsibilty on the plea of *ultra vires* for acts deliberately done, with all the usual and needful formalities, and where they have received the entire benefit they contracted for, such a defense

should no longer be tolerated in our courts. Where the question is merely as to the capacity to contract, a party who has had the benefit of the contract should not be permitted, especially where there is no unlawful intent charged upon the other party, and he is in no sense in *pari delicto* to question its validity. To deny to a plaintiff thus situated the benefit of the contract would be substantially to secure to the party, deliberately violating one of the laws of its existence, and where no guilty complicity can be charged upon the other party, the fruits of an illegal transaction, and to operate as a premium upon repudiation and fraud."

In *Bissell v. The Michigan Southern & Northern Indiana Railroad Companies*, 22 N. Y., 258 (*ante*, seventh selected case, in Ch. III), the action was for an injury received by the plaintiff while riding upon the road operated by the defendants and caused by their negligence. The defense was, that the defendants had no authority to operate the road; that the act of operating it was *ultra vires* and void; that they had no power to contract with the plaintiff to carry him thereon, and that they were not liable for the negligence.. The facts relating to the operation of the road are disclosed in the opinion of COMSTOCK, C. J., who observes in relation to the liability of the defendant, as follows: "Can, then, two railroad corporations, having connecting lines, thus unite their business for the purpose of promoting their common interests; charter another and a connecting road, in furtherance of the policy, hold themselves out to the public as carriers over the whole route, enter into contracts accordingly, receive the benefit of those contracts, and then, when liabilities arise, interpose their own charter to shield them from responsibility? Such a defense is shocking to the moral sense, and although it seems to have some support in judicial opinions, I think it has no foundation in law. * * * A banking institution, through its board of directors may invest its funds in the purchase of stocks of cotton, and every holder of its stocks may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market and disaster is threatened, the doctrine that a corporation can never act outside its charter enables it to say, 'this is not our dealing,' and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value; while the injured dealer must seek his remedy against agents, perhaps irresponsible or unknown. Corporations may thus take all the chances of gain without incurring the hazards of loss."

Other cases where ultra vires contracts were enforced, in cases of executed or partly executed contracts.—In *The Steam Navigation Company v. Weed*, 17 Barb., 378, the action was by a corporation created in the State of Connecticut for money loaned the defendant in the State of New York, and the defense was that the plaintiffs were not authorized to loan money, and that they were expressly precluded from embarking in banking business. In this case the opinion of the court was given by PARKER, J., who observes: "It was a loan of money for a single day without taking any note or security, and for aught that appears without charge or intention to charge for its use. It was a single, isolated, casual transaction, not for the purpose of gain, but to oblige a customer. It was

not an act of banking. (*People v. Brewster*, 4 Wend., 498.) The question then was, not whether the loan was a violation of an express statute, but whether the corporation had power, express or implied, to make it. I think in such cases the defendant who has received the money is not at liberty to question the authority of the lender. * * * I am happy to come to the conclusion that the law will not sustain this most unconscionable defense. It ill becomes the defendants to borrow of the plaintiff $1,000 for a single day to relieve their immediate necessities, and then turn around and say 'I will not return you this money, because you had no power by your charter to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the extent of the plaintiffs' chartered privileges. We shall lose our respect for the law when it so far loses its character for justice as to sanction the defense here attempted."

But it should be remembered that such defenses on the part of the corporation have been frequently sustained by the courts; and if they can be tolerated in such cases, the other party to the contract should be allowed to interpose them. This is not said, however, in defense of the application of the doctrine of *ultra vires* in such cases, but rather to show that it is frequently used to sustain a most unconscionable defense.

To the same effect is the decision in *The Sacket's Harbor Bank v. Lewis Co. Bank*, 11 Barb., 213. In that case there was a provision in the charter of the bank that it should not, directly or indirectly, deal or trade in, or buy or sell any goods, wares, or merchandise, or in any commodities whatsoever, except to sell the same when truly pledged by way of security for debts due the corporation. The plaintiff, in order to secure a debt, had taken a quantity of butter, to the amount of $10,000, which it subsequently sold to the defendant, who agreed to pay the market price therefor, and also repay money loaned by the plaintiff to the defendant at a future day. The defendant, in an action on the contract, set up its incapacity to purchase the butter of the plaintiff. But, it appearing to be an isolated transaction, it was held valid, and a nonsuit, which had been granted, was set aside.

So in *Suydam v. The Morris Canal & Banking Co.*, 5 Hill, 491, where a loan was made to the defendant in the city of New York, and the defendant's charter provided that their banking operations should be carried on in the city of Jersey, the court held that the provision of the charter had reference to customary and permanent business of the bank, and was not intended to prohibit a single act of loaning at a different place where an officer of the bank might be at the time. See, also, same case affirmed on error in the Court of Appeals of the State of New York, 6 Hill, 217; *Potter v. Bank of Ithica*, 5 Hill, 490.

In *Silver Lake Bank v. North*, 4 John. Ch., 370, where it was alleged that a corporation created in Pennsylvania had exceeded its power in making a loan, Chancellor KENT said that "it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in a collateral way, to decide a question of misuser, by setting aside a just and *bona fide* contract."

And in *State of Indiana v. Woram*, 6 Hill, 37, it appeared that the Staten

Island Whaling Company executed to the defendant the promissory note sued on, and that the same was duly transferred and delivered to the plaintiff; that said company was incorporated "for the purpose of engaging in the whale fishery and in the manufacture of spermaceti candles"; that said note was given for State bonds of the plaintiff, and was executed and transferred in consideration of said bonds. BRONSON, J., said: "Another objection to the second and third sets of counts is, that the Staten Island Whaling Company has no power by its charter to purchase or deal in State bonds. It was incorporated 'for the purpose of engaging in the whale fishery and in the manufacture of oil and spermaceti candles', and has only such general powers as are incident to all corporations. * * * I agree with the counsel for the defendants that this company had no authority to purchase or deal in those bonds. But since the decision *Moss v. The Rossie Lead Mining Co.*, 5 Hill, 137, I do not see that a corporation can ever avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase. And if the company was bound, I see no reason why the defendants should not also be bound by the contract."

In the case above referred to (*Moss v. The Rossie Lead Mining Co.*), the corporation had purchased a large amount of property which had been previously used by the vendor in carrying on the business of washing and smelting lead ore, consisting in part of a house and lot, fifty acres of improved land with several houses thereon, a building which had been used as a store, a school-house, threshing-machine, etc. The defendants were incorporated for carrying on the business of smelting and washing lead ore; and the note sued on was given by them for the property purchased. It was held that the purchase was not necessarily in excess of the power granted by the charter, and that the plaintiff was entitled to recover thereon.

By the Court, COWEN, J., *inter alia:* "Where the vendors are apprised that a company are acting in fraud of their charter, and knowingly sell for the purpose of effecting the fraud, a different question arises. But tenements, being taken in lease, goods purchased, though even for a criminal object, such as carrying on smuggling, or for the purposes of prostitution, this being a secret with the lessee or vendee, forms no defense against an action for the rent or price, by the persons from whom the lease was taken or the goods obtained. If articles bought by a corporation cannot possibly be of any use in the line of corporate business, but the purchase is necessarily in excess of power, a question might be raised on that ground. Yet in dealing with corporations created for manufacturing purposes, who that does not take a part of them shall be holden to penetrate the ramifications of their business, so far as to fix the boundary of possible utility? Such a company as the defendants must have lands, houses and wood, as well as mines, machinery and utensils. They may resort to all the ordinary means of paying workmen and providing them and their families with residences, and who would deny in this country of schools that they may pay by providing school-houses and schoolmasters for the children of workmen. Education in certain branches is better than cash. Even the threshing-machine, the purchase of which was thought by counsel to be such a scandalous excess, might have been quite useful in preparing and furnishing grain for the

workmen and their families, who might prefer this as an article of payment. It would, moreover, thresh the grain for the teams employed in marketing the lead. Is it quite clear that lands to a reasonable extent and within the limits of the company's capital may not be cultivated and crops raised by them as another means for paying the expenses of their business? But above all, I repeat, shall those by whom the company are furnished with articles of doubtful utility be made responsible for the excess? I think not."

Remarks and suggestions.—We here find suggested the difficulty attending the application of the doctrine to cases of this character, and it leads us to consider whether the doctrine should be applied in suits at all on contracts. Is the reason in support of the rule in such cases of sufficient force to weigh against all the injustice inflicted or liable to be inflicted by its application as a defense in suits on contracts? In cases of this character, it would appear necessary for the vendor to take the chances of the judgment of a court or the verdict of a jury, as to whether the article sold was of sufficient utility to the corporation to avoid the application of the defense of *ultra vires*. And this question must be one of fact, to be determined from all the circumstances of the case. It would hardly be possible to suppose a sale to a corporation of any article that might not be of some use in the conducting of its legitimate business, and on the general reasoning of the court in the last case, can the court say, as a matter of law, that any article which may be purchased is not within the scope of the powers of a corporation for manufacturing, trading, or commercial purposes, to purchase?

The argument for the application of the doctrine in these and other cases is, that the corporation might extend its action without limit in this direction, and subvert the authority of the State if its *ultra vires* acts were held valid. But the State, as we shall hereafter show, has a more ample remedy in such cases by proceedings by *quo warranto*, or in the nature of *quo warranto*, and this remedy, in view of the hardship of the defense of *ultra vires*, was suggested in some of the preceding cases. And in the case of *Chester Glass Co. v. Dewey*, 16 Mass., 94, where the plaintiffs claimed to recover for goods sold and delivered to the defendant, and the defendant objected that the plaintiffs were prohibited from trading in goods, the court (per PARKE, C. J.), said: "The defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition by causing the charter to be revoked, when they shall determine that it has been abused."

So, in the case of *Palmer v. Lawrence*, 3 Sand. (N. Y. S. C.), 170, DUER, J., observes: "A defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but all such objections, if valid, are only available on behalf of the sovereign power of the State. * * * It would be in the highest degree inequitable and unjust to permit him to rescind a contract the fruits of which he retains, and can never be compelled to restore."

The general doctrine relating to the *ultra vires* contracts of private corporations, where they have received the consideration or benefit of the same, in respect to the enforcement of the contracts, as illustrated by the preceding cases, has frequently been recognized in the enforcement of *ultra vires* contracts of municipal corporations. See *post*, Ch., IX.

CHAPTER V.

ILLUSTRATION OF THE DOCTRINE IN ITS APPLICATION IN EQUITY, TO RESTRAIN UNAUTHORIZED ACTS.

TENTH SELECTED CASE.

COLEMAN v. THE EASTERN COUNTIES RAILROAD COMPANY.*

The directors of a railway company, for the purpose of increasing the traffic proposed to guarantee certain profits and to secure the capital of an intended Steam Packet Company, who were to act in connection with the railway.

Held, first, that such a transaction was not within their powers, and they were restrained by injunction.

Held, secondly, that in such a case one of the shareholders in a railway company was entitled to sue, "on behalf of himself and all the other shareholders, except the directors," who were defendants, although some of the shareholders had taken shares in the Steam Packet Company.

A plaintiff filed a bill on behalf of himself and the other shareholders in a railway company to restrain the directors committing a breach of trust. It appeared that he was suing at the instigation of another rival company. *Held*, that this circumstance was not, of itself, sufficient to prevent him obtaining a special injunction on the merits of his case.

THIS was a motion to dissolve a special injunction under the following circumstances:

Under the powers contained in their act of Parliament (6 & 7 W. 4, c. cvi, local and personal), the Eastern Counties Railway Company and the Eastern Union Railway Company had formed a railroad from London to Manningtree, a place within ten miles of the port of Harwich. The directors of these com-

* Reported in 10 Beav., 1 (1846).

panies conceived that it would add to the traffic and profit of the railway if a steam packet company could be formed communicating between Harwich and the northern parts of Europe, and they accordingly took proceedings for the establishment of such a company.

A prospectus was issued and a deed of settlement was prepared, whereby it was proposed that the shares in the projected company called "The Harwich Steam Packet Company," should be offered to the shareholders in the above mentioned railway companies.

The railway company intended to guarantee to the shareholders in the Steam Packet Company a dividend of five per cent per annum upon their paid-up capital until the dissolution of the Steam Packet Company, and that upon the dissolution the whole paid-up capital should be paid by the railway companies to the holders of the Steam Packet Company in exchange for a transfer of their assets and property.

The plaintiff, a shareholder in the Eastern Counties Railway Company, objected to this, and to prevent it, he instituted this suit, on behalf of himself, and all other proprietors of shares in that company (except the defendants) who should come in and contribute to the expenses of the suit, against the company and all the directors.

The bill, after alleging a case to the above effect, stated, that in *October*, 1846, the plaintiff called upon the secretary to inquire into the nature of the arrangement between the two companies, and was informed that the proposed arrangement was of this nature; that passengers should be conveyed from *London to Rotherham*, etc., for certain fixed fares, and that if it should be found necessary that the whole of those fares should be paid over to the Steam Packet Company, in order to declare a dividend of five per cent, the railway company would pay the whole amount received for the fares to the Steam Packet Company.

The bill also stated that many of the proprietors of shares in the Eastern Counties Railway Company had declined to take any share in the Steam Packet Company, and had altogether disapproved of the proposed arrangement between the railway company and the Steam Packet Company; but

that several proprietors of shares in the Eastern Counties Railway Company, upon the faith of the proposed guarantee had accepted the shares allotted to them, and had paid the deposits thereon.

The bill stated that no contract or agreement had at present been entered into with the Harwich Steam Packet Company, under the common seal of the Eastern Counties Railway Company, or in any other manner, sufficient to render an agreement or contract legally binding upon the said railway companies.

The bill prayed a declaration that it would be a breach of trust on the part of the directors of the Eastern Counties Railway Company to enter into any contract, etc., on behalf of the Eastern Counties Railway Company to guarantee to the Harwich Steam Packet Company any dividend on their capital, or the repayment of the said capital in case of the dissolution of the Steam Packet Company, or to apply any funds of the railway company in making any payment to the Steam Packet Company for any of the purposes aforesaid; and it might also be declared that the directors of the railway company were not authorized to make any reduction from their usual tolls, etc., in favor of any person or goods conveyed to or from Harwich by any steam packet belonging to the said Steam Packet Company; and that the directors of the Eastern Counties Railway Company might be restrained by injunction from entering into such proposed arrangement, or any such contract, agreement or undertaking as aforesaid, etc.

On the 19th of November, 1846, a special injunction was granted *ex parte*, by the Master of Rolls, to restrain the defendants, the directors, until the 26th of November, from entering into the proposed arrangement with the Steam Packet Company, or any such contract, agreement, or undertaking as was mentioned in the bill.

This injunction was afterward continued till the 14th of December, when the case was agreed before the Master of Rolls, upon a motion and a cross-motion; the defendants moved to dissolve the injunction, and the plaintiffs moved to continue it.

In support of the motion to dissolve the injunction an

affidavit was sworn by Mr. Roney, the secretary of the Eastern Counties Railway Company, stating that it was the general practice for railway companies to agree with the proprietors of coaches, omnibuses, and other vehicles for the conveyance of passengers and goods between the various stations on the railways and adjoining places, with a view to increase the traffic on the railways, and that the railway companies usually guaranteed to the proprietors of the coaches or omnibuses a percentage of at least 5*l.* per cent, and indemnified them against loss in the use of vehicles; that he believed the proposed arrangement with the Harwich Steam Packet Company would be very beneficial to the railway company; that the arrangement had not been agreed to by the shareholders in the railway company, nor had it been discussed at any meeting of their shareholders called for that purpose; and that there were more than 8,000 shareholders in the Eastern Counties Railway Company.

He further stated that the plaintiff was a wharfinger, and in that capacity was an agent of the General Steam Navigation Company, and that his solicitors in this suit were the solicitors of that company; and that the deponent believed that the bill had been filed and the injunction obtained, at the instigation and request of the General Steam Navigation Company, who feared that their interests would be injuriously affected by the establishment of the Harwich Steam Packet Company, and not for the purpose of protecting the interests of the shareholders in the railway company; that a special general meeting of the shareholders in the Eastern Counties Railway Company had been held on the 12th day of November, 1846, and that the chair of the company then stated that nothing could be done to bind the shareholders of the railway company to any arrangement with the Steam Packet Company, until such arrangement should have been approved at a special general meeting convened for that purpose; and that the directors had not, nor ever had, any intention of entering into such contract without the sanction of their shareholders. This affidavit was not contradicted.

The MASTER OF ROLLS.

This is a motion to dissolve an *ex parte* injunction, restraining the defendants from entering into a particular agreement with a company called the Harwich Steam Packet.

Three reasons have been offered for dissolving the injunction. One is personal to the plaintiff; and as to this, I am of opinion, looking at the affidavit of Mr. Roney, that there is not sufficient ground to say that the plaintiff has not a right to sue and ask for an injunction, if the merits of his case entitle him to one.

The next objection is as to the form of the pleadings, and I do not think I should be right in coming to a conclusion upon it without carefully examining the frame of the record.[a]

The third ground is upon the merits; and I think, after the full discussion the matter has undergone, and considering the great and extensive importance of the principle involved in it, that I ought not to abstain from at once giving my opinion upon the point.

There are four parties to be considered: the plaintiff, the defendants, the Eastern Counties Railway Company, the Eastern Union Railway Company, and a company, or proposed company, called the Harwich Steam Packet Company. The plaintiff is a shareholder in the Eastern Counties Railway Company, and has no interest whatever except in that company, and he is exposed to no liability except such as may be incurred in properly carrying on the business of that company. I think it right to observe that companies of this kind, possessing most extensive powers, have so recently been introduced into this country that neither the legislature nor courts of justice have been yet able to understand all the different lights in which their transactions ought properly to be viewed. We must, however, adhere to ancient general and settled principles so far as they can be applied to great combinations and companies of this kind.

Joint stock companies have funds so extensively large, and exercise powers so extensive and so materially affecting the rights and interests of other persons and the rights which the

[a] On this point *Deeks v. Stanhope*, 14 Sim., 57, was afterwards referred to.

public or the subjects of her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion that the powers which are given by act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned.

How far those powers which are necessarily or properly to be exercised for the purposes intended by the act extend, may very often be a subject of great difficulty. We cannot always ascertain what they are. Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend that it has been nowhere stated that a railway company, as such, has power to enter into all sorts of other transactions: indeed it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts, but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of others' transactions, however various and extensive, provided the object of that liability is to increase the traffic upon their railway, and thereby to increase the profit of the shareholders. There is, however, no authority for anything of that kind.

It has been stated that these things, to a small extent, have frequently been done since the establishment of railways; but,

unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority. To suppose that the acquiescence of railway shareholders, for the last fifteen years, in any transaction conducted by a railway company, is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the sort of frenzy which, during that period, the country has been in.

There has been no project, however wild, which has not been encouraged by some one or more of these companies: there has been no project, however wild, in which the shareholders have not acquiesced, either of cupidity, hoping to gain extraordinary profits beyond their first anticipations, or from the terror of entering into a contest with a combination of persons so powerful as a railway company. I must, in the absence of any legal decision, say that I consider that the acquiescence of the shareholders in such transactions affords no ground whatever for the presumption for their legality.

I am far from saying that that which is here proposed to be done might not be profitable to this company, or that it might not be a public advantage. I am far from expressing an opinion that the establishment of a steam packet company at Harwich, communicating with this railway, might be not only of public but of national importance, or that it might not be proper to give this company authority to do that which they are now attempting to do, as it seems to me without authority; I mean to express no opinion as to this.

What they are doing is this: under the powers of this act of Parliament, enabling them to do what is required for the construction, maintenance and proper and convenient use of this railway, they are proposing to pledge the funds of this company to support the proposed Harwich Steam Packet Company to the extent of 150,000*l.* or even 300,000*l.* The agreement is of this nature: A proposition is made to certain individuals to establish a steam packet company from Harwich to the northern ports, and the directors say we will do all we can to encourage the shareholders in the railway company to become shareholders in the steam packet company. This might be a very legitimate and proper mode of encouragement, because it

would be done at the expense and risk of each individual, who makes his own choice whether he will incur any liability. But, besides this, the directors of the railway company propose, whatever may be the success of the steam packet company, and even if it should fail, to secure to the subscribers to the steam packet company interest to the extent of 5*l.* per cent upon the capital out of the funds of the railway company; and, moreover, if the steam packet company should fail altogether, so that it would be proper to put an end to it, the directors of the railway company propose that the funds of the railway shall be pledged to pay back to every subscriber to the steam packet company the full amount of his subscription.

It is not proposed that the railway company should directly, and by its own directors, engage in the steam packet company and carry on that trade; but only that they should impose on the railway company the whole risk and liability, not only of paying interest at the rate of 5*l.* per cent, but if the transaction should turn out an unprofitable one, of making good to every shareholder the full amount which he has paid.

Is there anything in the act of Parliament sanctioning such a course of proceedings? Do the powers to construct, maintain, regulate the traffic, and to do all that is necessary for the purpose of carrying on and working the railroad, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable, add to the profits of the railway company? Surely, there is nothing in the powers given by the act of Parliament which can authorize that.

It has been argued that I must either allow this to be done or that I must hold that nothing can be done that is at all out of the express words of the act of Parliament. Now, I shall remain of opinion, until it has been decided by higher authority, that this is not within the powers given by the act of Parliament; and when another and a different case is brought before the court, it will be judged of by the circumstances which attend it. But I must say that, in my opinion, to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation is a thing which,

according to the terms of this act of Parliament, they have not a right to do. At the same time I am far from saying that there may not be many small things, perhaps small excesses of authority, which are so obviously beneficial that the shareholders would all acquiesce in them and never think of complaining of them. It does not, therefore, follow that they cannot do the least thing not expressly mentioned in the act. I believe they have the power to do all such things that are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it.

I do not now intend to enter into a discussion of how far such a proceeding is affected by the principles of public policy; but this may be observed, that if there is any one thing more desirable than another, after providing for the safety of all persons traveling upon railways, it is this, that the property of railway companies should be itself safe, that a railway investment should not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best things that could happen to them would be that the investment should be of such a nature that prudent persons might, without improper hazard, invest their moneys in it. Quite sure am I that nothing of that kind can be approached if railway companies should be at liberty to pledge their funds in support of any plausible speculation not authorized by their legal powers, and which might very possibly, to say the least, lead to extraordinary losses on the part of the railway company.

I repeat, as I said at first, that I consider this to be a question of great importance, not merely to the railway companies who claim these powers, but to the public, in a greater variety of ways than it is necessary for me to point upon this occasion. I say, therefore, that subject to the examination which I shall feel it my duty to give to the pleadings, I shall not dissolve this injunction. If I find that the pleadings are improperly framed, then I think the objection ought to be brought forward in another form; namely, by demurrer.

The MASTER OF THE ROLLS stated that he had examined the bill and was of opinion that it had been properly framed and that the injunction must be continued.

A CHANGE OF CORPORATE PURPOSES WILL BE ENJOINED.

ELEVENTH SELECTED CASE.

ZABRISKIE v. THE HACKENSACK AND NEW YORK RAILROAD COMPANY AND OTHERS.*

1. A legislative charter is a contract between the State and the corporators, which the State cannot impair.
2. Corporators or partners, associated for a special purpose specified in their charter or articles of partnership, cannot change that purpose without the consent of all the corporators or partners.
3. The reservation in a charter that the State may, at any time, alter, amend, or repeal it, is a reservation made by the State for its own benefit, and is not intended to affect or change the rights of corporators as between each other. Nor does it authorize the State to authorize one part of the stockholders, for their own benefit at their mere option, to change their contract with the other part.
4. The power to alter or modify a charter is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change.
5. A grant of an additional franchise to a corporation not affecting or impairing those before granted, does not alter or modify the charter, if it does not compel the corporation to exercise such franchises. Such grant can be made whether the right to alter and modify be reserved or not. But in neither case can the corporation be compelled to accept them, nor can part of the corporators accept them without the consent of all.
6. Corporators who stand by and suffer the company to contract a new work authorized by law, without interference, will be held to have acquiesced in it, and, by such acquiescence will lose their remedy in equity.

*Reported in 18 N. J. Eq., 178 (1867).

THIS case was argued upon a rule to show cause why the defendants should not be enjoined from mortgaging the property of the company, or from expending its funds in the construction of a road not authorized by their charter, but being an extension of the original road authorized by a supplement to their charter.

THE CHANCELLOR.—The Hackensack and New York Railroad Company was incorporated in 1856 with power to construct a railroad from Hackensack to the Patterson and Hudson River Railroad, with a capital of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act it laid out, located and built a road five miles in length, terminating at Essex street in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and equipments, franchises and other property. By a supplement to this charter, passed March 12, 1861, it was authorized to extend the road northwardly to Nanent, on the Erie Railway, in the State of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act; and to secure the payment of said bonds, the said company shall have power to mortgage the said road with its franchises and chartered rights."

In 1861, the company extended its road under this supplement to a point in Passaic street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this it executed a new mortgage upon the whole road, as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a

half north of the present terminus, reaching from Hackensack to Newbridge, and has made contracts for the construction of it, and has, by resolution, determined to make a new mortgage to cover the whole road, as it will be when finished to Newbridge, with its equipment and appurtenances, and the chartered rights and franchises of the company, to secure one hundred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to Newbridge.

The complainant is a stockholder in the company; and of nine hundred and thirty shares of capital stock issued, for one hundred dollars each, he owns three hundred and twenty-four. He applies for an injunction to restrain the defendants from constructing the extension to Newbridge, and from executing the mortgage proposed.

He opposes the extension on the ground that it is a different enterprise from that for which his stock was taken, and the money paid, and that neither the directors, nor a majority of the stockholders, can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

The extension to Nanent, authorized by the act of 1861, has never been submitted formally to the stockholders, nor has it in any way been approved of by them, or a majority of them, except by the assent given in the answer in this suit, to which the directors are made defendants, which is sworn to by the directors, individually, who own together five hundred and seventeen shares of the capital stock. But, of this, two hundred shares, held by one of them, Mr. Robert Rennie, is special stock, issued to him to build the Lodi Branch, which is leased to him during the existence of the company, and which he is to operate at his own expense and for his own profit, under the agreement that he shall pay as rent the dividends that may be declared on these two hundred shares; and under another agreement, indorsed on the certificate of stock issued for these shares, that they are to be entitled to no dividends beyond the rent of the Lodi Branch, or, in other words, that

he is to pay no rent, and this stock is to receive no dividends. Under these circumstances, this stock can receive no benefit from the extension if it is profitable, nor sustain any loss from it if it is ruinous. And it would seem that if the consent of a majority of the shareholders was necessary to the new enterprise of the extension, that the assent of the other three hundred and seventeen shares held by the directors, not being a majority of the whole stock held by the complainant, who dissents, is not the consent of the majority of the shareholders. And, if it is necessary to obtain the majority to make the extension authorized by the supplement of 1861, that consent does not appear in the cause as now presented.

The extension authorized by the act of 1861 is a radical change in the object of the incorporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Patterson Railroad, at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen county, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly, if not wholly, agricultural, with no village, except the small one at Newbridge, on its route, and it runs into the State of New York some distance, and terminates at a point on that part of the Erie Railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

The question here is, can this company, either with or without the consent of a majority in interest of its stockholders, compel the complainant to embark capital subscribed for the first enterprise in this new one, entirely different.

Since the Dartmouth College case in the Supreme Court of the United States, the doctrine has been considered firmly established and been confirmed by repeated decisions, both in that court and in the State courts, that a charter granted by the legislature to a corporation is a contract between the State and the corporators, and that the State can pass no act to take away or impair any of the franchises or privileges granted by it. The company or artificial person thus created, and its

property, is subject to all the general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided, they are not such as to take away or impair any of the franchises plainly granted by the charter. This doctrine did not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this State, and most of the States of the Union, that when a number of persons associate themselves as partners for a business and time specified in the engagement betwen them, or become members of a corporation for definite purposes and objects specified in the charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner, or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and corporated into the constitution of the United States, and of almost every State in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association has been formed.

The leading case on this subject is that of *Natusch v. Irving*, decided by Lord ELDON in 1824. It is not contained in the regular reports but may be found in the appendix to Gow, on Partnership (3d Ed.), 576, or in Lindley on Partnership, p. 511. There a partnership was formed for life insurance, and after it was entered into an act of Parliament made it lawful for such a firm to enter upon the business of marine insurance, which was prohibited to them before. A majority of the partners determined to embark in the business of marine insurance thus made lawful.

Lord ELDON held them barred by the contract of copartnership, unless every partner agreed to alter it. In England the same doctrine is applied to corporations rigidly and is acknowledged in all cases on the subject. And although from the omnipotent power of Parliament, restrained by no written constitution, they hold that the contract can be changed by act of Parliament, yet the English Court of Chancery will enjoin the directors, or the corporation, on application of a single stockholder, from using the common funds to apply to Parliament for a change.

The doctrine of *Natusch v. Irving*, was adopted in New York by Chancellor KENT in the case of *Livingston v. Lynch*, 4 Johns., C. R., 573, and in this State, by the decision of PARKER, master, sitting to advise the Chancellor, in *Kean v. Johnson*, 1 Stockt., 401, and has been recognized and adopted in almost all the States of the Union.

The opinion of Chancellor BENNETT in *Stevens v. The Rutland and Burlington R. Co.*, 29 Vt., 548 (also found in 1 Am. Law Reg., 154), contains a very able exposition and application of it. It will also be found in Ang. & Ames on Corp., § 391–3, and § 536–9; Lindley on Part., 515; Pierce on Railways, 78; *Hartford and New Haven R. Co. v. Croswell*, 5 Hill, 383; *Troy and Rutland R. Co. v. Kerr*, 17 Barb., 581; *Macedon Plank Road Co. v. Lapham*, 18 Barb., 312; *Buffalo, Corn. and N. Y. R. Co. v. Potter*, 23 Barb., 21; *Barret v. The Alton and Sangamon R. Co.*, 13 Ill., 504; *Graham v. Birkenhead R. Co.*, 2 McN. & G., 156.

After the effect of the rule established in the Dartmouth College case began to be felt in the States it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted; and that provisions incautiously inserted too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislatures of many States, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify, or repeal the act; and also by general law provided

that all acts of incorporation thereafter passed should be subject to such alteration and repeal.

The provision is contained in the general act of this State, passed in 1846 (Nix. Dig., 152, § 6), that such charters should be subject to alteration, suspension and repeal, in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The State, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise conferred by the act, nor compel them to exercise any new power or franchise conferred.

Besides this general law of the State, the charter of the defendants contains this provision, that "the legislature may, at any time after, modify or repeal the same."

The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the State for the benefit of the public, to be exercised by the State only. The State was making what had been decided to be a contract, and it reserved the power of change by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the others, which they did not have before.

It was to avoid the rule in the Dartmouth College case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object.

On general principles, and the settled rules of construction, I would hold this to be the effect, and only effect, of the provision in the general act and in the charter of the defendants, without any hesitation, were it not for a series of decisions by most respectable courts, which hold that this provision obviates the effect of the rule in *Natusch v. Irving*, and *Kean v. Johnson*, and enables a majority of the corporators in all charters subject to a like provision, to change by legislative provision,

and within certain limits, the object and purpose of the corporation. They hold that the contract between the associate corporators, that they will confine their business to life insurance, is changed by legislative permission to engage in the marine insurance, or a contract to join in constructing a railroad from New York to Newark, can be changed to one from New York to Elizabeth by legislative consent. The reasoning is founded on the fact that the subscription for the stock, which is the contract, was made, as in this case, under a charter which authorizes a road from the Patterson road to Hackensack, and authorizes the legislature to alter and modify the act. And from this they infer that it is a contract to join in building any road that the legislature may, by such alteration, authorize the company to build; and that such authority, or additional privilege, may be accepted by a majority of the corporators.

So far as the alteration is made by the legislature, in a way to be compulsory on the corporation, this is correct; as, if they should require the company to build a double track, or widen the draws in a bridge, or exact less fare and toll; these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration.

But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the legislature may alter, not that the stockholders may, as between each other. The case of *Natusch v. Irving*, was decided upon this very ground. The act of Parliament had given the company *the power* to embark in marine insurance, but the consent of all the parties was still held necessary. The plain object of the reservation in this case was to give the legislature, not a bare majority of the stockholders, power.

This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of the decisions in other States is against it.

In Maine the decisions of the Supreme Court are in accordance with it. In the case of *Meadow Dam Co. v. Gray*, 30

Maine, 547, the company was incorporated to build a dam across navigable waters. Under the power reserved to alter and repeal, an act was passed requiring it to make in the dam a lock for the benefit of public navigation. This was not increasing the powers or changing the enterprise of the corporation, but requiring in the work authorized an accommodation for the public, omitted in the original act. What the change was is not mentioned in the report, but it is stated in the *Oldtown and Lincoln R. Co. v. Veasie*, by Chief Justice SHEPLEY, who delivered the opinion in both cases.

In the case of the *Oldtown and Lincoln R. Co., v. Veasie*, 39 Maine R. 571, the act of incorporation, passed March 8th, 1852, authorized not less than eleven thousand, nor more than fifteen thousand shares. Veasie, August 13th 1852, subscribed for one thousand shares; only nine thousand five hundred shares were subscribed. A supplement passed September, 1853, under the power reserved to alter, fixed the capital at not less than eight thousand, nor more than twenty-five thousand shares. This was accepted by the directors. Veasie was sued for his subscription, and objected on the ground that until the supplement was passed, the number of shares required to constitute the company not having been subscribed, he could not be sued for his subscription, and that the legislature under the power reserved, although they might alter the charter, could not affect the rights of the stockholders between themselves, or change their contract with the company.

The court held that he was not liable under the original act to be sued until eleven thousand shares were subscribed for, and that the power to amend did not authorize a change in the rights or liabilities of the corporators between themselves.

Chief Justice SHIPLEY says (p. 280): "The legislature might as well have attempted to alter a contract between the corporation and one of its members respecting the construction of the road, as a contract respecting any part of its capital. If a corporation, being party to a contract with one of its corporators, might, by the assistance of the legislature, absolve itself from the preformance of any part of

the contract it might from the whole, and might require payment of the money subscribed, without allowing the subscriber to derive any benefit from it. It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be raised by an act of the legislature, and not the private contracts made between the corporation as one party, and its corporators as the other."

Now, in this case, the private contract between the stockholders and the corporation, or between them mutually, on subscribing for the stock, was that their enterprise was the road from the Patterson road to the Hackensack, and the power reserved was not to authorize any of the parties to this private contract, at their pleasure, to violate it. The supplement of 1861 does not require the extension to be built; it only authorizes it at the option of the corporation. The words are, "it shall be lawful for said company to extend their railroad." And it is held in England, where the courts by *mandamus* compel a company to construct the road that it is incorporated to construct, that an act giving the privilege of extension is not obligatory on the company, and the *mandamus* is in such case refused. *York and Midland R. Co. v. Regina*, 1 Ellis & Bl., 858; in which the Exchequer Chamber reversed the decision of the Common Bench, in Ellis & Bl., 178, in the same case.

In New York a different rule has been established, and it is held that the power to alter will authorize the company, by consent of the legislature, to extend its enterprise without the consent of the stockholders. The rule was first adopted to enable companies to subscribe to the stock or bonds of other enterprises that brought business to them, and then was extended to cases where they were authorized to build extensions or branches to their own works. *North R. R. Co. v. Miller*, 10 Barb., 260; *White v. Syracuse and Utica R. Co.*, 14 Barb., 560; *Sch. & Sar. Plank R. Co. v. Thatcher*, 11 N. Y. R. (1 Kern.), 102; *Buff. and N. Y. City R. Co. v. Dudley*, 14 N. Y. R. (4 Kern.), 336. The reasoning of the judges in these cases does not satisfy me. The courts which decided the first cases would not have adopted the principles which guided

them if they had been asked to apply it to a case like this, or like the later cases in New York.

In 14 Barb., 570, Judge EDWARDS, in delivering the opinion of the court, says, that under this reservation the legislature cannot create a new company with a new and distinct business, but that in the case before them the company would remain the same as to character, structure, objects and business. It would have the same road, the same buildings and property, with the same agents, as it would have if the law had not been passed. But the principle of power, to let a majority alter, is the same, whether the alteration be great or small, and courts can exercise no discretion as to the extent of change which the company, by permission of the legislature, may adopt.

In the case of *Sch. & Sar. Plank R. Co. v. Thatcher*, 11 N. Y., 109, the court put their decision on the ground that the change was unimportant and would not injure the defendant; and seem, by their reasoning, to admit that if the change had been as great as in the case of *The Hartford & New Haven R. Co. v. Crosswell*, they would have decided differently.

In *The Buffalo & New York City R. Co. v. Dudley*, 14 N. Y., 355, SELDEN, J., in delivering the opinion of the court, places the decision on the ground that it was ruled in the case just quoted, "that no mere addition to, or alteration of the charter, *however great*, could operate to discharge a shareholder from his obligation to the corporation," and he questions the soundness of the decision in the *The Hartford & New Haven R. Co. v. Crosswell.* These decisions are not sufficiently consistent, or so based upon the principles that should govern this case, as to influence me to depart from the conclusions arrived at.

The Supreme Court of Massachusetts has followed the decisions in New York, and in the well considered and well argued case of *Durfee v. The Old Colony R. Co.*, 5 Allen, 230, arrived at the conclusion that the reserved right to alter and repeal, authorized a company to engage in a new enterprise without the consent of all the shareholders. The reasoning of the able counsel who combated this position contains the best exposition of the law that I have found anywhere. The reasoning of Chief Justice BIGELOW, in delivering the

opinion of the court, does not convince me. He places the decision upon principles not recognized in this State, and relies upon the two cases in Maine, cited above, as well as those in New York, as supporting his view. He assumes (on p. 244) that it is the object of the provision that an amendment may be made by the consent of *both parties*, the legislature on the one side and the corporation on the other; the former expressing its assent by a legislative act and the latter by a vote of its stockholders; and observes "that it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms, with the consent of the other contracting party."

Now, in this State, it is settled that an alteration made by the legislature, under this reserved power, is valid and binding, without the consent, and against the will of the corporation, and all its members. The two decisions in the Court of Errors not yet reported upon the charters of the Norris and Essex Railroad Company, and of the Jersey City and Bergen Railroad Company settle that the legislature may, against the will of the companies, change the mode of taxation prescribed in their charter for one more burdensome.

And the rule of the common law as to contracts adopted here gives the power to the parties, when both assent, to alter any contract without the stipulation for that purpose, which would seem, from the language of the opinion, to be ordinarily inserted for it in Massachusetts. Such stipulation is seldom or never made in New Jersey.

This view that the object of the reserved power was to give the majority of the corporators the power to control the minority, with the consent of the legislature, has never been adopted in this State. The act of Massachusetts, Statutes, 1831, Ch. LXXXI, to which reference is made, contains no provision as to consent of the stockholders, but is a pure, simple reservation of power, like the act of New Jersey.

The decisions in the case of *Banet v. Alton and Sang. R. Co.*, 13 Ill., 504; *The Pacific Railroad v. Renshaw*, 18 Missouri, 210; *The Pacific Railroad v. Hughes*, 22 Missouri, 291, hold that a majority of the stockholders, by authority of the legislature, may make a change, provided it is not great or

a radical one. They, in express terms, say that a change like this would not be warranted, and, so far as of authority, are on the side of complainant.

But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may, by authority from the legislature, change the object of the enterprise, in small things, there is no principle of law by which they can be restrained in any a little larger, or in the character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for banking or insurance business, or for a canal, theater, brewery, or beer saloon.

There is no other alternative to the proposition that while the power reserved authorizes the legislature, within certain limits, to make such alterations as they chose to impose, it gives no authority, when the legislature does not impose them, for the majority to adopt such alterations or enter upon such enterprises as are allowed by the legislature.

Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter, but it cannot impose a new one and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually viewed sense. Power to alter a mansion or house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep its identity; and a matter of the same kind, wholly or chiefly new substituted for another, is not an alteration; it is a change.

In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad seventeen miles from the Patterson road to Nanent is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

Again, the power is to alter or to modify the act, and the

true construction of this I hold to be, an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; and the right to take land by condemnation, the right to take toll or fare, or the amount to be taken. But the legislature had no right to impose upon the company any other duty, or anything involving any other duty, than that attending the building a railroad from the Patterson road to Hackensack; anything in the manner of doing what they had a right to change. They could not oblige it to dam and drain all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Nanent. They could as well oblige it to run to the Pacific. We must keep in mind that by the decisions in New Jersey the company need not accept the alterations; they are bound by them without acceptance if within the power reserved.

By a wider construction of this power any of the main lines of railroad running through the State, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route, that the legislature may direct. It must be held that the power to alter and modify does not give power to make any substantial addition to the work.

Again, the act of 1861 does not, in fact, alter or modify the act of 1856 in any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remains the same. And the defendants can now go on under it precisely as if the supplement had not been passed. The company is authorized to construct another road; it is not compelled to do it. If it builds it, or if it does not, its old charter remains with all its franchises and privileges intact, and no new burdens imposed, except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd to say that an owner had *altered* his house, who had built a larger one on an adjoining lot. And until the legislature have made a valid alteration of the charter, the rights of each stockholder are

as held in *Kean v. Johnson;* he can prevent all the others from changing or abandoning the work.

The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the legislature have a right to grant, as they could grant to this corporation the right to conduct banking or insurance business, or to run a ferry across the North River; but the company is restrained by the law of corporations and partnerships from expending the money or using the credit of the corporation in such enterprises, unless every shareholder consents.

The extension to Passaic street, both because it comes within the grant in the charter, and more especially because every shareholder must be held to have consented to it by acquiescing in its construction and maintenance for years, must be decided to be lawful.

The defendants must be restrained from extending the road beyond its present terminus at Passaic street, and from expending any money of the company to pay for any such extension, or from giving any mortgage for the cost of such extension.

There is no foundation for an injunction against a mortgage for any lawful object, on either part of the road. There is great doubt whether a mortgage on either of the two parts of the road heretofore constructed, for the costs of the other, would pass the franchises of the company in such mortgaged part, but it would be valid as to the property other than franchises, which the company can mortgage without any special power. And besides, the bonds of the company, or its lawful contracts, would entitle the holder to recover upon them, and under the judgment, by the act of 1858 (Nix. Dig., 719), the whole road and franchises would be sold. The complainant, therefore, cannot be injured by a mortgage, whether valid or not, upon any part of the road.

MISAPPLICATION OF CORPORATE FUNDS WILL BE ENJOINED.

TWELFTH SELECTED CASE.

PRATT v. PRATT, READ & COMPANY.*

Where a corporation is about to exceed its powers by applying its property to objects not authorized by its charter, a court of equity will interfere in behalf of the dissenting minority of the stockholders.

The corporation and its directors are trustees for the stockholders, and as such fall under the supervision of the courts of chancery.

But where a manufacturing corporation had a large surplus above its stated capital, which the directors, with the concurrence of a majority of the stockholders, were about using for the purpose of extending the business of the company and erected an additional factory against the objection of a minority of the stockholders, but it appeared that the business as extended was within the powers of the corporation, and that the stated capital of the company was much less than the amount actually used and necessary for its ordinary operations, it was held, on a bill brought by the dissenting minority praying for an order that the surplus be divided among the stockholders and the company be enjoined against erecting a new factory, that the facts were not such as to require the interposition of the court in behalf of the minority.

Bill for an Injunction brought to the Superior Court for Middlesex county.

THE bill alleged that the petitioners in the year 1863 associated themselves with Julius Pratt, Henry C. Butler and others as a joint stock corporation by the name of Pratt, Read & Company, under the statute with regard to such corporations, for the purpose of manufacturing and selling ivory, bone, shell and wood combs, and piano and melodeon ivory, and other articles made in part or in whole of ivory; that the capital of the corporation was held $175,000; that the petitioners were owners of a minority of the stock; that the corporation had been and was still engaged in a profitable business, but that the directors had combined with the owners of a majority of the stock to misapply the funds of the corporation; that there was a surplus of earnings in the hands of the

*Reported in 33 Conn., 446 (1866).

treasurer amounting to $125,000, which the petitioners had insisted upon having divided, but the directors had refused; that the company was proceeding, through the directors and without any vote of the stockholders, to erect a large and expensive building for the purpose of extending their business beyond what was contemplated when the company was formed; that the petitioners were in need of their share of the surplus for their individual purposes; and that the directors and the majority of stockholders were acting fraudulently and in disregard of the interests of the petitioners, and were conspiring together to secure their own private interests by means of the corporate organization and funds and to injure the interests of the petitioners. The bill therefore prayed for an injunction against the corporation forbidding it to proceed with the erection of the building, and for a decree that the corporation divide among the stockholders the surplus funds on hand.

Upon the bill and the answer of the respondents the court found the following facts:

The respondents, a joint stock corporation under the name of Pratt, Read & Company, was on the sixth day of October, 1863, duly organized and located in the town of Meriden and county of New Haven, with a capital stock of $175,000, divided into seven thousand shares of $25 each, for the "purpose of manufacturing, selling, and dealing in all kinds of ivory, shell, horn, bone, rubber, wood and other combs, all kinds of piano and melodeon ivory, and other articles made in whole or in part of ivory, shell, bone, India-rubber, gutta-percha, composition, wood or metal, and to purchase, hold, sell, and deal in all real and personal estate necessary and convenient for the prosecution of said business, and generally to do all acts connected with or incidental to said business or the prosecution of the same." The stockholders of the corporation are exclusively composed of the former members of the firms of George Read & Co., and Pratt Brothers & Co., late of Saybrook, in Middlesex county, and the stockholders in the former corporation of Julius Pratt & Co., late of Meriden. The petitioners are the former members of said copartnership of Pratt Brothers & Co., and now own 1,441 shares of stock. The remaining 5,559 shares are owned and held by those in-

dividuals who formerly composed said copartnership of George Read & Co., and said corporation of Julius Pratt & Co. One of the principal objects in the formation of the new corporation by the consolidation of said copartnership and corporation, was to secure as far as practicable uniformity in prices, and certainty in profits, and to that end it was understood by all concerned that the respondents were not to receive and be prejudiced by any competition from any of its own stockholders, and that they should not carry on the same business independently of the business of the respondents.

In June, 1864, Ulysses Pratt, one of the petitioners, purchased from the Deep River Ivory Comb Company, a corporation located in Saybrook, their factory, machinery, fixtures and privileges, and in February or March, 1865, formed a copartnership with other persons and commenced and still carries on thereat the business of manufacturing ivory combs, and sells their manufactured goods in competition with the respondents.

At the time the respondents were organized, the real and personal assets of the corporation of Julius Pratt & Co., and of the copartnerships of George Read & Co., and Pratt Brothers & Co., were appraised by persons, mutually selected, at $446,000, which was held in the following proportions; to-wit., by Julius Pratt & Co., $258,511, by George Read & Co., $89,593, and by Pratt Brothers & Co., $97,917, and in the subscriptions to the capital stock of the respondents, the members of said corporation Julius Pratt & Co., and of said copartnerships of George Read & Co., and Pratt Brothers & Co., subscribed and owned in the same proportions. The remainder of the real and personal estate of said corporation and copartnerships, amounting to $271,000, after deducting and applying the capital of the respondents, $175,000, which was taken by the respondents, and the notes of the new corporation given in the same proportions that the stock was subscribed to said corporation of Julius Pratt & Co., and said copartnerships of George Read & Co., and Pratt Brothers & Co. All the notes so given to George Read & Co., and Pratt Brothers & Co., were paid at maturity, and all those given to said corporation of Julius Pratt & Co., had been paid at the

time of the bringing of the suit, except about $36,000, which for the accommodation and convenience of the respondents had been extended and allowed to remain over due.

At the time of the organization of the new corporation there was a general understanding by the parties that the notes should be paid at its convenience, and that they should be extended to suit its convenience in reasonable prosecution of its business, and that the payment of the notes to the holders should be received by them in lieu of dividends, until they were all canceled and discharged; but the petitioners, Alexis Pratt and Felix A. Dennison, were not cognizant of and did not participate in that understanding, and it did not clearly appear that the other petitioner, Ulysses Pratt, did.

At the time of the bringing the petitioners' bill; to-wit., on the 8th of March, 1866, the outstanding indebtedness of the respondents was about $72,000, of which $30,000 was matured and had been exhausted as aforesaid, and the respondents had then on hand in cash $21,000, and a surplus of property and earnings including said cash of about $130,000. This surplus, aside from said $21,000 in cash, consisted of stock, manufactured goods, and some $50,000 in paper, taken on short time, upon the sale of manufactured goods at their agency in New York. The amount and value of the respondents' surplus was arrived at by an inventory and estimate of its assets, made, so far as that portion which consisted of manufactured goods was concerned, at 28 per cent below the selling prices in market.

The building now in process of erection by the respondents in Saybrook is designed for the manufacture of piano keyboards, a business incidental to the manufacture of piano keys, and, if carried on to a considerable extent by the respondents, requires the additional room and power and expenditure contemplated in the building and improvements which the respondents have commenced to erect and make, and which, with the machinery and fixtures, and the necessary additional outlay in lumber and materials will call for some $30,000 or $35,000.

The directors of the corporation at the time of its organization contemplated the prosecution in some manner of this branch of business, and the said Ulysses Pratt was then and

for some time thereafter one of its most earnest advocates; but the petitioners have never been in favor of conducting it at so great expense, or so as to interfere with the payment of fair and reasonable dividends; and the successful prosecution of the business has not yet been fully established, and at the time of the commencement by the respondents of said building, and at other times since, the petitioners have objected to and remonstrated with the directors and insisted upon having their share of the earnings of the corporation paid to them, and the said Alexis Pratt has little other means or source of income for the support of himself and family, and needs whatever justly belongs to him as the avails of his stock and interest in the corporation.

The corporation has made no dividends since its organization, except one of five per cent in July, 1865, which was declared for some purpose connected with the United States income tax, and at the same meeting at which the dividend was declared, the said Ulysses Pratt, acting for himself and as an agent of the other petitioners, desired and moved a dividend of forty per cent, which motion was rejected.

The business of the corporation has, from its organization, been, and still is, very prosperous, but it has not cash funds to pay its debts, erect and make the contemplated buildings, improvements and expenditures, and pay a dividend; and if it assumes or undertakes to do all these at present it must either borrow money to a considerable amount or force the sale of its manufactured goods at a loss; but if the erection of the new building and the prosecution of the piano key-board business is abandoned it can safely make a liberal dividend from its accumulated profits. Its property cannot be forced upon the market and disposed of faster than by its regular sales at its agency in New York without material sacrifice, and the present tendency in the prices of its goods is somewhat downward, partly in consequence of sales at under prices made by Pratt, Smith & Co., a corporation of which the said Ulysses Pratt is a member and agent, and partly from other causes connected with the business of the country; and, to conduct the business successfully, a large capital in said material and manufactured goods is necessary, and a much larger sum than $175,000

is required, unless a considerable amount in surplus can be retained and employed for that purpose. The corporation, through its directors, has acted in the premises without malice, improper motive or fraud towards the petitioners or either of them, and in the management of its business and concerns has exercised what they believed to have been a sound and reasonable judgment and discretion.

Upon these facts the case was reserved for the advice of this court.

HINMAN, C. J.—The petitioners seek in this case the aid of a court of equity to compel the respondents, a joint-stock corporation, to declare and pay over to its shareholders a reasonable dividend out of its surplus earnings; and also to enjoin it from making further expenditures in the erection of a large factory building, for the purpose of enlarging its business and thereby exhausting its surplus funds, to the injury of the petitioners, who are a minority of its stockholders opposed to such an enlargement. The petitioners make in their petition a very strong case for the equitable interference of the court in their behalf. And if it had been sustained by the facts found by the court we could have no hesitation in granting them the relief asked for. When a corporation is about to exceed its powers by applying its property to objects beyond the authority of its charter it is well settled that a court of equity will grant relief to a minority of its stockholders who dissent from such use of the funds. *Hartford & New Haven Railroad Co. v. Croswell*, 5 Hill, 383; *Stevens v. Rutland & Burlington R. R. Co.*, 29 Verm., 545; *Lears v. Hotchkiss*, 25 Conn., 171; *Scofield v. Eighth School District*, 27 Id., 499.

Indeed, this doctrine necessarily results from the principle which underlies the cases, that the corporation and its directors are trustees, and as such may be called into a court of chancery, either for an account or to restain them from mismanagement of the corporate property, especially for a fraudulent mismanagement of it, or for the purpose of compelling the corporation and its directors to declare dividends from its surplus earnings, where such dividends are needlessly and improperly withheld. *Robinson v. Smith*, 3 Paige, 222; *Scott v.*

Eagle Ins. Co., 7 Id., 198. Indeed joint stock companies in modern times are nothing but commercial partnerships, which have taken the form of corporations for the greater facility of transacting business, and to prevent a dissolution of the concern by those numerous events which are so liable to work a dissolution in a copartnership composed of a great number of individuals; and they must have applied to them principles making them accountable like all trustees, or the grievance would be intolerable, since otherwise a majority of the stockholders, acting through the directors, who would thus cease to be in fact what the law considers them, the agents of the whole body of stockholders, and would become the private agents of the majority might set the minority at defiance, and manage the affairs for their own supposed benefit and the benefit of the majority who appointed them. The true doctrine upon this subject appears to us to be very fairly and correctly stated by Chancellor WALWORTH, in the case of *Scott v. Eagle Ins. Co.*, 7 Paige, 203, when he says that "as the directors are bound to exercise a proper discretion in making dividends of surplus profits, if they abuse that power by dividing the unearned premiums without leaving sufficient to satisfy probable losses, they may, in case of any extraordinary loss, which is sufficient to exhaust the whole capital and more, make themselves personally liable to the creditors of the company; on the other hand should they, without reasonable cause, refuse to divide what is actually surplus profits, the stockholders are not without remedy, if they apply to the proper tribunal before the corporation has become insolvent."

The surplus of this corporation over its nominal capital which the petitioners seek to have divided is so large, and bears so great a proportion to the capital that we have felt the necessity of stating our views of the principle which should govern in determining questions of this sort the more distinctly in order to prevent the case from being used as a precedent against ordering a dividend to be made, where there is confessedly a large surplus over the capital on hand, and no reason can be given for withholding it from the stockholders except the mere will of the directors acting by the advice of a majority of the stockholders. In cases of this description the

question must always be, when a surplus is asked to be divided, and the directors refuse to declare a dividend, whether there is a reasonable cause for withholding it. Now, in the first place, before a dividend is ordered to be made, it should appear clearly that there is a surplus to be divided. In this case the surplus appears to be very large in reference to the nominal capital of the company; but when examined in reference to its actual capital it is otherwise; and we think we find sufficient reason in this fact for not ordering a dividend. In the first organization of the corporation the sum of $175,000 was named as the nominal capital in the articles of association. But it is evident from all the facts in the case that the actual capital was much larger and consisted of all the property purchased of the individual stockholders, who had all been engaged in the business contemplated to be carried on by the company, which was of the agreed value of more than $400,000; the difference being made up to the stockholders by the corporation notes, which were expected to be paid, as they principally have been out of the subsequent profits of the business, and not by an immediate sale of any large portion of the assets thus purchased of its stockholders. It could not have been the intention to force the sale of this large amount of property. This could not have been done without great sacrifice, and if such had been the intention the corporation never would have purchased it. They, therefore, must have intended to use it as a part of their capital, or to keep it on hand as surplus until that part of it which consisted of manufactured goods could be sold, in the regular course of business, with which all the stockholders were familiar. There is no evidence that they have not converted their manufactured goods into cash as fast as it can be done in the successful prosecution of their business, and to order them to do it faster than this, is simply to order them to make needless sacrifices. The reason for stating the amount of their capital at so much less than its actual amount was does not appear, and it is not very important that it should. It is enough to say of it that while it is not a course to be recommended for general adoption, the finding in this case is very full to the effect that nothing improper or fraudulent was intended by it; and the

success of their business fully sustains the finding that the directors have, in all their transactions, exercised a sound judgment and discretion.

Again, the court finds that it was the general understanding of the stockholders that their notes against the corporation, given for the largest part of the property purchased at the time of the organization, as they should be paid, should be regarded and received by them in lieu of dividends, which implies certainly that no dividends should be declared until that large indebtedness should be paid; and this has not yet been done by some thirty thousand dollars. But there was as much reason for declaring a dividend when the corporation was first organized as there is now, except so far as the comparatively small sum in cash on hand is concerned. As then, the business appears to have been honestly and discreetly managed; and as it is found, moreover, that to conduct it successfully requires a much larger capital than $175,000, unless a considerable surplus is retained; and, as we believe it to have been the intention of the company to retain a surplus to at least the amount of its capital for that purpose, and as the ordering of a dividend would necessarily involve the sacrifice of a large amount of manufactured goods at a forced sale, it appears to us that it would be very inequitable and unjust to the managing majority to advise the superior court to order such a dividend to made.

The remaining question is, whether the corporation ought to be restrained from erecting their new factory for the manufacture of piano key-boards. The directors, at the time the corporation was organized, contemplated the prosecution of this business. The articles of association state the purpose of the organization to be to manufacture, sell and deal in all kinds of ivory, shell, horn, bone, rubber, wood and other combs, and all kinds of piano and melodeon ivory, and other articles made in whole or in part of ivory, shell, horn, bone, India-rubber, gutta percha, composition, wood or metal, and to purchase, etc., and to do all acts connected with or incidental to the said business or the prosecution of the same. It is not very strenuously claimed but that the manufacture of piano key-boards, as connected with the manufacture of all kinds of piano ivory, and

especially of all other articles made in whole or in part of ivory, composition, wood or metal, comes within the contemplated purpose of the corporation, as expressed in the articles. The question, therefore, in this part of the case, is confined merely to whether the contemplated expenditure for this factory is so great as unnecessarily and unreasonably to hazard the petitioners' stock. On a question of this sort much must necessarily be left to the discretion of the managing directors, and so long as they keep within the objects contemplated by the articles of association, and the expenditure is not unreasonable in reference to the amount of their capital, a court of equity ought very seldom to interfere with them. In the organization of these companies, parties, if they see fit to do so, can provide specifically as to the business that shall be transacted, and if they omit to do this, but, on the contrary, express the purposes of the organization in such general terms as to admit of a very large discretion in the management of their business, the presumption is that it was intended that the discretion of the managers in this respect should be unlimited. There is nothing in the articles here that shows any intention to limit the discretion of the managers in this respect to the particular business contemplated, except it be the naming of a sum as the amount of the capital. This, in most cases, would and ought to be some guide in respect to the amount that it would be reasonable to expend in permanent fixed property and machinery; but this, in this case, appears to have been fixed without much reference to the amount of business to be done. We feel, therefore, that it is impossible for us to say that the expenditure of this sum ($35,000) for this new factory is so clearly extravagant and disproportionate to the amount of capital stock as to justify the court in enjoining against it. We, therefore, advise the superior court to dismiss the petitioners' bill.

In this opinion the other judges concurred, except CARPENTER, J., who, having heard the case upon a motion to dissolve the injunction in the court below, did not sit.

NOTES.

A stockholder may restrain.—A stockholder may commence a suit in equity on behalf of himself and all others having a common interest with him, to restrain the unlawful acts of directors, by injunction; or to require such parties to account for a fund of the corporation which they have misappropriated; and this, even though opposed by all other stockholders. *Keen v. Johnson*, 1 Stock., 401; *Simpson v. Westminster, etc., R. Co.*, 8 H. L., 717; *Ernest v. Nichols*, 6 Id., 401; *Railway Company v. Allerton*, 18 Wall., 233. But it seems necessary in such cases that the corporation should first refuse to bring the suit; in which case the corporation should also be made a party defendant. *Davenport v. Dows*, 18 Wall., 626; *Dodge v. Woolsey*, 18 How. (U. S.), 331; *Hersey v. Veazie*, 24 Me., 9; *Smith v. Hurd*, 12 Met. (Mass.), 371; *Allen v. Curtis*, 26 Conn., 456; *Western R. Co. v. Nolan*, 48 N. Y., 513; *March v. Eastern R. Co.*, 40 N. H., 548; *Same v. Same*, 43 Id., 515; *Lanman v. Lebanon*, 3 Pa. St., 46; *Atwood v. Merryweather*, L. R., 5 Eq., 464; *Samuel v. Holliday*, 1 Woolw., 400; *Heath v. Erie R. Co.*, 8 Blatch., 347; *Brewer v. Proprietors, etc.*, 104 Mass., 378; *Brown v. Van Dyke*, 4 Halst., Ch., 795; *Butts v. Woods*, 38 Barb., 181; s. c., 37 N. Y., 317; *Manderson v. Commercial Bank*, 28 Pa. St., 379; *Sears v. Hotchkiss*, 25 Conn., 171; *Central, etc., R. Co. v. Collins*, 40 Ga., 582; *Gifford v. New Jersey, etc.*, 2 Stock., 171; *French v. Gifford*, 30 Iowa, 148; *Wright v. Oroville M. Co.*, 40 Cal., 20; *Bagshaw v. Eastern, etc., R. Co.*, 7 Hare, 114; *Simpson v. Westminster R. Co.*, 8 H. L., 717; *Kerngham v. Williams*, L. R., 6 Eq., 228; *Attorney v. Easterlake*, 11 Hare, 205; *Same v. Norwich, etc., R. Co.*, 16 Sim., 225; 21 L. J., Ch., 141; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How., 381; *Memphis v. Dean*, 8 Wall., 64; *Belmont v. Erie R. Co.*, 52 Barb., 637; *Bliss v. Anderson*, 31 Ala. (N. S.), 613; *Black v. Delaware, etc., R. Co.*, 7 C. E. Green (22 N. J. Eq.), 130; s. c., 9 Id. (24 N. J. Eq.), 455; *Balfour v. Ernest*, 5 C. B. (N. S.), 601; 28 L. J., C. P., 170. See, also, *Hoole v. Great Western R. Co.*, L. R., 3 Ch., 262; *Menier v. Hopkins' Tel. Works*, L. R., 9 Ch., 350; *Bird v. Bird's Patent, etc.*, Id., 358; *Coleman v. Eastern Counties Railway Company*, 10 Beav., 1; *Salomons v. Laing*, 12 Id., 339; *Simpson v. Denison*, 10 Hare, 62; *Munt v. Shrewsbury, etc.*, 11 Beav., 1; *Stevens v. South., etc., R. Co.*, Id., 49; *Fisk v. Chicago, etc., R. Co.*, 53 Barb., 513; *Allen v. Curtis*, 26 Conn., 456; *McAlleer v. McMurray*, 58 Pa. St., 126.

Directors cannot increase capital stock beyond the chartered limits.—In *Railway Company v. Allerton, supra*, the defendant in the appeal filed a bill praying for an injunction to prevent the increase of the capital stock of the company. The court below decreed in his favor and the company took the appeal.

Mr. Justice BRADLEY, in delivering the opinion of the court, observed: "Without attempting to decide the constitutional question, or to give construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter, cannot be made by the directors alone unless expressly au-

thorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons, who contribute a joint capital for a common purpose, and, although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and the amount of capital cannot be increased, except in the manner expressly authorized by charter or by articles of association.

"Authority to increase the capital stock of a corporation may, undoubtedly, be conferred by a law passed subsequent to the charter, but such a law should be regularly accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but, in some form or other, it must be given, to render the increase valid and binding on them. Changes in the purpose and object of an association, or, in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character and cannot on general principles be made without the express or implied consent of the members." The decree below was affirmed.

A stockholder may enjoin misapplication of funds.—In *Samuel v. Holliday, supra*, a bill was filed by plaintiffs, stockholders in a corporation, to enjoin the defendant from disposing of property conveyed to him by the corporation, and asking for a decree declaring the deed of trust conveying such property and the sale made to the defendant thereunder void, and restoring the property to the corporation, on the ground that the proceedings were void, and that the funds had thereby been misapplied. The able opinion of Mr. Justice MILLER, would seem to require another limitation of the doctrine of *ultra vires* to corporate acts. He observes: "The plaintiffs' conduct does not commend them to a court of equity. The trustees held possession of the property four months before the sale. During all this time the sale was advertised, and during a part of it one of the plaintiffs was a director in the company. Both of them knew that the possession of the property was in trustees; that the business had been taken out of the officers of the company, and that the sale was impending. Payment to Holliday of what was due him, at any time during those four months, would have prevented the catastrophe, which in effect not only extinguished its business but its existence. And yet neither of the plaintiffs made any efforts to save it by raising the money and tendering payment of what was due. To the present hour no effort to redeem has been made. By this course of conduct they have acquiesced in the proceedings taken on behalf of Holliday, and are concluded thereby. If a stockholder intends to treat an act of the corporation, or its officers or agents as illegal, he must insist upon his objections before the act is committed. He cannot stand by and see it done, and then hold the persons responsible who have been involved in it." See, also, *Hodges v. The N. E. Screw Co.*, 3 R. I., 9; *Peabody v. Flint*, 6 Allen, 52; *Graham v. The Berkenhead, etc., R. Co.*, 12 Beav., 460; 2 Mac. & G., 146; 2 H. & T. W., 450; 20 L. J. (N. S.), 445; 14 Jur., 494; *Hodgson v. The Earl*, 1 De G., Mac. & G., 6; L. J. (N. S.), Ch., 17; 15 Jur., 1022; *Ffooks v. The London S. W. R. Co.*, 17 Jur., 365; 19 E. L. & Eq., 7.

In *Dodge v. Woolsey*, 18 How. (U. S.), 331, the plaintiff was a stockholder in a bank, and the defendant a collector who was about to collect a tax which was illegal; and the plaintiff had requested the bank to take legal steps to prevent the collection, but the latter had refused so to do. The Supreme Court of the United States held that the suit could be maintained by the plaintiff against the collector for an injunction. The court observes, "It is now no longer doubted either in England or the United States, that courts of equity in both have a jurisdiction over corporations at the instance of one or more of their members to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of their charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares; as either party may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquiry into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act; if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."

In *Ffooks v. London & S. W. R. Co.*, *supra*, Lord CRANWORTH observed: "This court will not allow any of the shareholders to say that they are not interested in preventing the law of their company from being violated."

Where suit may be brought by a stockholder, though no request so to do is made to the corporation.—In *Heath v. The Erie Railway Company*, 8 Blatchf., 347 (1871), it was held that where the bill of a stockholder sets out acts which are *ultra vires* in issuing shares of stock, and also breaches of trust which are frauds upon the stockholders, as such acts and breaches of trust are beyond the power of the corporation to affirm or sanction, it is not necessary that the stockholder should aver that he has applied to the corporation or board of directors to bring the suit, and that they have refused.

This decision is sustained by many American and English authorities. See, to same effect, *March v. Eastern R. Co.*, 40 N. H., 548 (1860); *Peabody v. Flint*, 6 Allen (88 Mass.), 52 (1863); *Gray v. Lewis*, E. L., 8 Eq. Cases, 526 (1869); *Atwool v. Merryweather*, E. L., 5 Eq. Cases, 464 (1867); *Hoole v. Great West. R. Co.*, E. L., 3 Ch. App., 262 (1867).

In the case last cited, Lord Justice ROLT observed: "If the act complained of is illegal, as I think it is, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers. * * * If one individual, having an interest, complains of an act of the whole company, or the executive of the whole company, as being illegal, there is, as a general rule, no necessity for any other shareholder being present." See, also, *Gregory v. Patchett*, 33 Bev., 595 (1864).

In *Hersey v. Veazie*, 24 Me., 9, the court say: "If the plaintiffs have been injured by these fraudulent acts, they should have taken measures to

have the corporation obtain redress. If, after proper exertions made, it had been found incapable of doing it, or had improperly or collusively refused to do it, they might, perhaps, have obtained redress by making it a party defendant."

This is undoubtedly the general principle, but it seems applicable only where the corporation is the injured party and should sue, and not, as we have seen, where the stockholders and others may be injured personally by the illegal and fraudulent acts of the corporation, through its directors or immediate managing agents. See, also, *Allen v Curtis*, 26 Conn., 456; *Bronson v. La Crosse R. Co.*, 2 Wall., 283; *Memphis City v. Dean*, 8 Id., 64; and the English cases of *Foss v. Harebottle*, 2 Hare, 461 (1843); *Lewis v. Gray*, E. L., 8 Eq. Cas., 541.

But, where he sues for a wrong done by the directors, whereby the assets of the corporation are wasted, he should sue not only in his own behalf, but for the benefit of all others in the same situation, and the corporation should be made a party. *Smith v. Rathburn*, 66 Barb., 402; *Smith v. Hurd*, 12 Met. (Mass.), 371; *Lyman v. Bonney*, 101 Mass., 562.

The case of Heath v. Erie R. Co., supra.—In this case, BLATCHFORD, J., reviews many authorities on the question of the jurisdiction of courts of equity in case of a bill by a stockholder, against the corporation, for acts *ultra vires* in issuing stock, and for breaches of trust. He says: "In the bill before us there are many acts set forth which are *ultra vires*. On the allegations in the bill it would appear that all issues of stock by the company, other than such as were specially authorized and approved, * * * [by certain acts of the legislature] were unauthorized and illegal, and that no authority for the issuing of any stock by the company can be derived from the tenth section of the general railroad act of April 2, 1850. Besides, the issues of stock not covered by the acts of 1860, 1861, 1862, 1864 and 1868 [above referred to], there are in the bill many acts charged in respect to the use and application of the corporate funds of the corporation, which were *ultra vires* of the corporation, and breaches of trust on the part of Gould, Fisk and Lane [also parties defendant], who constituted a majority of the executive committee, to which committee, according to the bill, the administration of the affairs and funds of the company appears to have been wholly given up by the board of directors. The bill, among other things, prays for preventive relief, by injunction, to restrain the corporation from issuing any new certificates of stock, except on the surrender and cancellation of certificates for existing void stock, on a regular transfer thereof, and to restrain Gould, Fisk and Lane, who have committed such breaches of trust, from exercising any further powers as directors, executive officers, or executive committee, and from interfering with or disposing of its property, funds or affairs.

Now, so far as the bill sets out acts *ultra vires* in issuing stock and breaches of trust, which are frauds on the stockholders, such acts and breaches of trust are beyond the power of the corporation or its directors to affirm, or sanction, or make good; and in such case, the authorities agree that the reason of the rule for an application to the corporation or its board of directors to bring the suit does not exist. Such reason is, that while the

stockholder is prosecuting his suit, the corporation, through its board of directors, may affirm and make good the acts complained of. But the rule ceases when the reason ceases. The bill is, therefore, clearly maintainable in respect to the acts *ultra vires* which it sets forth, and the preventive relief it seeks, founded thereon, without reference to anything contained in it."

Restraining corporate elections.—It may be proper to observe that the jurisdiction of courts of equity has frequently been invoked in this country to restrain corporations from proceeding to the election of officers and parties from voting upon illegal stock. The ground of interference in such cases, has rested upon fraud and illegality in the issue of stock, or the appropriation of funds to be used for the purpose of influencing and controlling such elections. *Campbell v. Paultney*, 6 Gill. & J., 94 (1834); *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (C. C.), 525. See, also, *Haight v. Day*, 1 Johns., Ch., 18 (1814); *Walker v. Devereaux*, 4 Paige, 229 (1833); and *Reed v. Jones*, 6 Wis., 680 (1857), where, under the peculiar circumstances of the case, injunctions were denied.

As to injunction to restrain the use of spurious and fraudulent stock, see *New York and New Haven Railroad Company v. Schuyler*, 34 N. Y., 30.

A stockholder may restrain the appropriation of funds of the corporation to extensions.—In *Stevens v. Rutland & Boston R. Co.*, 29 Vt., 562, the court held, that if a majority of the railway company obtain an alteration of their charter, which is fundamental so as to enable them to build an extension of their road, any shareholder who has not assented to the act may restrain the company from applying the funds of the original organization to the extension.

In *Clearwater v. Meredith*, 1 Wall., 25, Mr. Justice DAVIS, who delivered the opinion of the court, expresses these views in reference to this change of the original objects of the corporation: "When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purpose and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line of railway, and averse to risking his money in one having a longer line of transit. But it is not every unimportant change which would work a dissolution of the contract. It must be such a change, that a new and a different business is super-added to the original undertaking." See, also, *The Hartford, etc., R. Co. v. Crosswell*, 5 Hill, 383; *Banet v. The Alton, etc., R. Co.*, 13 Ills., 510; *McMahan v. Morrison*, 16 Ind., 172; *McCrary v. Junction R. Co.*, 9 Id., 358; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St., 46; *Gray v. Monongahela Nav. Co.*, 2 W. & S., 150.

In *Kean v. Johnson*, 1 Stockt., 401, the facts were as follows: A railroad under a special charter had been constructed from Elizabethtown to Somerville in New Jersey. Another company had been chartered to construct an-

other road from Somerville to the Delaware River. The latter company was, by its charter, authorized to purchase the Elizabethtown and Somerville road, so as to make a continuous line across the State of New Jersey, and on the purchase being effected the two roads were to become consolidated into one by the name of the Central Railroad Company of New Jersey. After an agreement for said purchase had been entered into, Kean, a stockholder in the first railroad company above mentioned, filed a bill to set aside the agreement and to restrain all further proceedings under it. The cause was referred to a master whose opinion was sustained on demurrer. He says: "As stockholders they own the road in common, to be employed in specified uses. Each owns a share in the whole. and is to have a proportionate share in the profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road, and in every dollar it earns. The directors are their trustees to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits; and this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract they each agree to abide by; but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not contemplated with, and growing out of this original, fundamental, joint intention." See, also, *Union Lock & Canal Co. v. Lowne*, 1 N. H., 44; *Middlesex T. C. v. Locke*, 8 Mass., 268; *Same v. Swan*, 10 Mass., 385; *Bagshaw v. Eastern Counties R. Co.*, 7 Hare, Ch., 114; *Salomon v. Laing*, 12 Bev., 339; 2 Hare, Ch., 461; *Solomon v. Randall*, 3 M. & C., Ch., 444; *Preston v. Grand Coll. D. C.*, 11 Sim., Ch., 327.

General rule applicable to enjoining corporations.—The general rule is that if a corporation is about to engage in an enterprise not authorized by the charter, or not originally contemplated by the corporation, as shown by its provisions, a court of equity will, by injunction, restrain such acts at the instance of a stockholder, and for the protection of the rights of stockholders. *March v. Eastern R. Co.*, 40 N. H., 548; *Pursey v. Kinnear*, 42 Ill., 160; *Winnebrenor v. Colder*, 43 Pa. St., 244; *Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis., 295; *Central R. Co. v. Collins*, 40 Ga., 582; *Breman v. Rufford*, 6 E. L. & Eq., 106; *Kean v. Johnson*, 1 Stockt. (N. J.), 401; *Simpson v. Westminster Palace Hotel Co*, 8 H. L., 712. But due diligence must be shown; and if delays are made in the assertion of such rights and large sums of money have been expended in enterprises that are even *ultra vires*, a court of equity will not grant relief by restraining the farther prosecution of the enterprise. *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St., 169; *Attorney-General v. Delaware, etc., R. Co.*, 27 N. J. Eq., 1; *Kent v. Jackson*, 14 Beav., 367; *Gregory v. Patchett*, 33 Id., 595.

In such cases the courts act with caution, and in determining whether or not they will restrain the corporation, they will duly consider the convenience or inconvenience likely to arise from the restraint as well as the extent of the injury likely to arise from the prosecution of the illegal act, and the certainty or uncertainty of the act being illegal or beyond the scope of cor-

porate power. *Fulden v. Lancashire, etc., R. Co.*, 2 De G. & S., 531; *Bullock v. Chapman*, 2 Id., 673.

We here observe a departure from the rigid rule at law that *ultra vires* acts are absolutely void, under all circumstances, as maintained in the earlier cases in the law courts.

Instances of restraint by injunction.—In *Kernaghan v. Williams*, L. R., 6 Eq., 228, the directors of the Dublin Trunk Connecting Railway Company instituted suit against the company, directors and other persons, for the purpose of recovering for the company moneys alleged to have been misapplied. Afterward on the reconstruction of the board of directors Williams and his co-plaintiffs became directors, and at a general meeting of the stockholders the directors were authorized to prosecute the suit aforesaid at the expense of the company and for its benefit. Subsequently a bill was filed by a shareholder to prevent the directors from so acting. The Master of the Rolls decided that the resolution of the board was *ultra vires*; that the adoption by the corporation of the acts of the plaintiffs in the suit was not authorized, as such action was not instituted by persons purporting to represent the corporation and to act on its behalf, and he restrained the directors from acting upon it. But see in case of proceedings instituted or defended by corporations on behalf of persons authorized by statute so to do, *Coroxton's Case*, 5 D. G. & S., 432; *Hull v. Taylor*, E. B. & E., 107; 27 L. J., Q. B., 311.

Restraint of applications to alter charters.—The jurisdiction of courts of equity has frequently been asserted in England to restrain applications to Parliament for amendments of charters. *Stockton & Hartlepool R. Co. v. The Leeds, etc., R. Co.*, 2 Phillips, C. C., 6 (1848); *Lancashire & Carlisle R. Co. v. Northwestern R. Co.*, 2 K. & I., 293; 25 L. J., Ch., 223; *Heathcoate v. North Staffordshire R. Co.*, 2 Mac. & G., 100; 20 L. J., Ch., 82 (1850). But see *Ware v. The Grand Junction W. W. Co.*, 2 Russ. & M., 470.

In this country the jurisdiction of courts of equity for this purpose has been denied. *Story v. Jersey City & Bergen Point Plank Road Co.*, 1 C. E. Green (16 N. J. Eq.), 13. In this case the Chancellor observes: "The plank road company were incorporated with power to construct a plank road upon an ancient public highway and with the franchise of taking tolls thereon. No limit is fixed for the duration of the charter. The legislature have since incorporated a company to construct a horse railroad between the same *termini*. They have authorized the plank road company to lay rails upon their track. They have, however, provided that if the plank road shall be continued, and if the rails are laid thereon by the plank road company, they shall be so laid as not to hinder or obstruct public travel. It must be presumed that the public convenience demanded the increased facility to be afforded by the construction of the railroad. Of that the legislature were the peculiar and exclusive judges.

"The complainant, a stockholder in the plank road company, now asks that the company shall be restrained from making any application to the legislature to abandon or change any part of their route, for this, it is insisted, would be fundamentally changing the objects of the company with-

out his consent; and that the railroad company, its officers, stockholders and promoters, shall be enjoined from aiding and abetting such application. If this claim has any foundation in law or in equity, which is by no means admitted, and if it be recognized, it would place it in the power of a single stockholder, for his own pecuniary benefit, against the wishes of every other stockholder and the convenience of the whole community interested in the line of travel, to prevent even a petition for a change." See, also, *Stevens v. Rutland & Burlington R. Co.*, 29 Vt. App., 545.

In *People, etc., v. Canal Board*, 55 N. Y., 400, ALLEN, J., observes: "Courts will not restrain and prohibit a citizen from petitioning the legislature, or any public body, or asking action by either in his behalf, whether with or without the authority of law, unless to do so would be a violation of some covenant agreement with others." Citing *Stockton & Hartlepool R. Co. v. Leeds, etc., R. Co.*, 2 Phillips, 666. See, also, *Telford v. Metropolitan Board*, L. R., 13 Eq., 574.

Restraint of use of funds to promote bills, etc.—We have noticed in various cases the application of the doctrine of *ultra vires* as a defense to suits at law on contracts entered into by corporations for the payment of money for services and expenses in promoting bills in Parliament, having for their object the conferring of additional powers and privileges upon the corporations. See *ante*, Ch. I. But its more just and equitable application is as a preventive remedy, where, in such cases, the corporation is restrained by injunction in a court of equity from entering into *ultra vires* contracts; and, generally from doing any *ultra vires* acts. And we find numerous cases where corporations have been restrained from using funds created for specific objects, to aid in the promotion of bills for a fundamental change of charters.

In *Munt v. The Shewsburg & Chester R. Co.*, 13 Beav., 1 (1880), the facts were these: The railway of the defendant communicated with the river Dee, upon the banks of which the company were empowered to erect wharfs, etc., and take tolls, which was done. The navigation of the Dee having deteriorated by gradual filling up, and fears being entertained that it would soon be rendered useless for navigation, and the company's wharfs prejudiced and their traffic impaired thereby, the company's directors, with the sanction of a general meeting of the company, introduced into Parliament a bill for the improvement of the navigation of the river Dee. The plaintiff was a shareholder, and filed a bill on behalf of himself and other shareholders, *inter alias*, for an injunction to restrain the application of the funds of the railway company, in or towards the payment of any expenses incurred or to be incurred in the prosecution of the bill, and from taking any steps or incurring any expense in the name or on account of the railway company, with a view to improve the navigation of the river. The Master of the Rolls said: "It appears that this company was at first established for the construction of a railway only, but it being important to make it serve as an outlet for the minerals produced in the district through which it passed, a branch was brought down to the river Dee. At that place the company was authorized to erect extensive wharfs and warehouses, and it then became not only a railway company, but a company for erecting

wharfs and warehouses. It must have been foreseen that the company might have very extensive business on these wharfs and within these warehouses, and it could not fail, therefore, to be known to everybody concerned in this railway, that they were materially interested in the navigation of the river Dee, on the banks of which the wharfs and warehouses were to be erected. The state of navigation must have been known; and it must, I think, be assumed that the railway, wharfs and warehouses, were constructed with reference to the known existing state of the river, and on the supposition that the river and its navigation were then in such a state as to enable this company to make profitable use of its railway, wharfs and warehouses; for if it had been thought necessary to improve it for the purpose of this railway, there seems no reason why powers to contribute towards that improvement, should not have been inserted in these acts of Parliament, in the same way as the powers for the construction of wharfs and warehouses.

It turns out that the navigation is not only worse than in former times, but is in a deteriorating state, so much so, that a report has been made upon a Government Commission that in time it is likely to be choked up, unless effective means be taken to prevent it. This information was important to the company, whose prosperity must depend probably in a material degree on the navigation of the river Dee being kept in a good state. It was therefore natural enough for them to wish not only that the deterioration of the navigation should be prevented but, if possible, be improved. I do not therefore in the least doubt that if there were funds legally applicable to the purpose, it would be very advantageous to this company to apply them in improving the navigation of this river; and if the navigation could not be improved, or its deterioration could not be prevented without it, and there were funds applicable for that purpose, I am not at all disposed to deny that it might be a most profitable and useful application of those funds, so to apply them. But there being no powers in the act of Parliament which extend to this matter, the question is, whether the company who have these funds only for the particular purpose prescribed in the act of Parliament, have a right to apply them to any other purpose whatever?

I think it has been absolutely and now unalterably decided in the Court of Chancery, that companies who are possessed of funds for objects which are distinctly defined by act of Parliament, cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the company, or to the individual members of the company." See, also, *The Attorney-General v. The Corporation of Norwich*, 16 Sim., 225; *Stevens v. The South Devon R. Co.*, Id., 48; *The Great Western R. Co. v. Rushout*, 5 De Gex & S., 290; 10 E. L. & Eq., 72; *Simpson v. Denison*, 10 Hare, 51; 16 Jur., 828; *Vance v. East Lancashire R. Co.*, 3 K. & J., 50.

Where, however, the constating instruments provide for the application or appropriation of funds for the purpose of promoting bills it will not be *ultra vires*, or enjoined by the courts. *Lyde v. The Eastern Bengal R. Co.*, 36 Beav., 10.

The corporation may restrain the transfer of bonds issued *ultra vires*. *Delafield v. The State of Illinois*, 26 Wend., 191.

CHAPTER VI.

ILLUSTRATION OF THE DOCTRINE IN ITS APPLICATION IN SUITS FOR A SPECIFIC PERFORMANCE.

THIRTEENTH SELECTED CASE.

SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY v. NORTHWESTERN RAILWAY COMPANY.*

SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY, *Appellants.*

THE NORTHWESTERN RAILWAY COMPANY AND SHROPSHIRE UNION RAILWAY AND CANAL COMPANY, *Respondents.*

Prima facie all corporate bodies are bound by contracts under their common seal; but this *prima facie* power to contract cannot be insisted on as to matters where, from the nature of the corporate body, or the object of its incorporation, it is expressly or impliedly, "by reasonable inference," prohibited from contracting. A contract as to such matters is *ultra vires*.

Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree of specific performance.

A private act of Parliament authorized one railway company to accept a lease of another railway; the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed "during the continuance of such lease." No lease within the provisions of the act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the companies.

Held, That equity would not enforce it by a decree for specific performance.

* Reported in 6 H. L. Cas., 112 (1857).

Lord St. Leonards and Lord Wensleydale, being shareholders in one of the companies, declined to take part in the hearing of the case.

In this case there had been a suit to enforce an agreement entered into between the appellants and respondents. The circumstances out of which that suit arose were these:

The Shrewsbury and Birmingham Railway is the property of the appellants, and runs in a southerly direction from Shrewsbury through Wellington and Shiffnal to Wolverhampton.

The Shropshire Union line runs in a similar direction from Shrewsbury through Wellington (this part of the line being common to both companies), and thence by Gnosall to Stafford.

The Northwestern Railway runs from London through Rugby to Birmingham, and then through Walsall to Portobello, skirts the town of Wolverhampton, outside which there is a station, and thence on to Stafford. Here it joins the Shropshire Union line and curves round through Gnosall to Wellington, and then proceeds by the same line as that of the appellant to Shrewsbury. The respondents also hold, on lease, a railway called the Trent Valley line, which runs from Rugby through Tamworth to Stafford, and thence on as before to Shrewsbury. They have also another railway called the Stour Valley line, which runs from Birmingham to Wolverhampton, where it joins the appellants' railway.

In 1847 the main line of the Northwestern was completed; the Trent Valley line was in the course of formation, and the Northwestern Company received the power (which it has since exercised) of taking that line on lease. The Shropshire Union line was then in the course of being formed, and by the acts obtained by that company, as well as by those obtained by the appellants, provisions were made for the management of that part of the line which was common to the two companies, by a joint committee of directors formed from the members of both.

In 1847 the Northwestern Company applied to Parliament for leave to take on lease the Shropshire Union line. It was believed that if that application should be granted, the North-

western Company would be in a position to command the traffic between Birmingham, Wolverhampton and Shrewsbury, as well as between Rugby, Birmingham, Stafford and Shrewsbury. The appellants, therefore, opposed the application, and that opposition led to the agreement which was the subject of this suit.

On the 13th of May, 1847, certain articles were executed between the appellants of the one part, and the respondent of the other part, by which it was arranged: "1. That all traffic between Wellington or Shrewsbury, or intermediate stations and Rugby, or any point to the south of Rugby, shall be kept separate, and divided between the two companies, in proportion to the mileage traveled over each of the lines of the Shrewsbury and Birmingham and the Shropshire Union companies, such joint account and division, however, to be optional with the Shrewsbury and Birmingham Company. This arrangement to include all the London traffic by whatever route it may pass. 2. Neither the Shropshire Union nor the Northwestern shall, during the continuance of such joint account and traffic, convey from Wellington, or any part of their line westward of Wellington, goods or passengers to any part of the Shrewsbury and Birmingham line east of the same place, or be entitled to participate in such traffic." An agreement was to be forthwith prepared to carry these articles into execution. In consequence of these articles, the opposition to the bill was withdrawn, and the act, 10 and 11 Vict., c. 121, passed. It was entitled "An act to authorize a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and Northwestern Railway Company."

After the passing of this leasing act, an agreement dated 12th October, 1847, for more effectually carrying it into operation was made. This agreement was entered into between the Shrewsbury and Birmingham Company, of the one part, and the London and Northwestern and the Shropshire Union companies of the other part, and was sealed with the seal of each company respectively. It recited the matters already stated, and then proceeded to stipulate, 1st. "That the Shropshire Union or the Northwestern Company shall at all times during

the continuance of any such lease authorized to be granted by such act, keep a separate account of all passengers, etc., which such companies, or either of them, shall carry from Shrewsbury or Wellington, or from any point between those two to Rugby, or to any places on the London side of Rugby on the line of the Northwestern Company, and also of passengers which such companies, or either of them shall carry from Rugby, or any place to the south of Rugby on the line of the Northwestern Company, to Wellington or Shrewsbury, or to any point between the two last mentioned places. And the Shrewsbury and Birmingham shall keep a separate account of all passengers, etc., which such company shall carry from Shrewsbury or Wellington, or from any point between those two places to Rugby, or any place on the London side of Rugby upon the line of the Northwestern Company, or to London, either upon the last mentioned line or upon that of any other Company."

2d. "That the Shropshire Union or the Northwestern Company on the one part, and the Shrewsbury and Birmingham on the other, shall respectively make out a half-yearly account in abstract of all the matters mentioned in the first article, which accounts were to be audited, and the auditors were to determine how much of the moneys had been received in respect of the distance from Shrewsbury or Wellington, or from any point between those two places, to Stafford or Wolverhampton, or from Stafford or Wolverhampton to Shrewsbury or Wellington, or to any point between those two places; and such sum, when so ascertained, shall be divided between the said Shropshire Union Company and the Northwestern Company as one party, and the Shrewsbury and Birmingham Company, as the other party, in the following proportions; (that is to say): six-thirteenth equal parts to the Shropshire Union Company and Northwestern Company, and the remaining seven-thirteenth equal parts to the Shrewsbury and Birmingham Company, those proportions being considered as substantially corresponding with the relative lengths of the lines of the Shropshire Union Railways and Canal Company from Wellington to Stafford, and the line of the Shrewsbury and

Birmingham Railway Company from Wellington to Wolverhampton.

3d. "That during the continuance of any such lease as aforesaid neither the Shropshire Union Company nor the London and Northwestern Company shall convey passengers from Shrewsbury or Wellington, or from any point between those two places, to any point or place on the line of the Shrewsbury and Birmingham Railway, or the Birmingham, Wolverhampton and Stour Valley Railway, nor use the line of the Shropshire Union Railway by Gnosall or Stafford to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway.

4th. "That the agreement hereby come to shall not, in any manner, be evaded or eluded by either of the contracting parties; nor shall any arrangement, scheme, device or contrivance be resorted to or attempted for that purpose;" and in case of any dispute it was to be referred, at the request of either of the said companies, to the arbitration of an umpire appointed by the railway commissioners.

5th. It was provided that it should be lawful for the Shewsbury and Birmingham Company to put an end to this agreement by six months' notice in writing, to be given to the Shropshire Union Company.

The only part of the Shropshire Union line which was ever completed was that from Shrewsbury through Wellington to Stafford, which was in use prior to the ninth of October, 1849, but no other part of that line has been completed, and no lease of the whole "undertaking" has been granted to the Northwestern Company.

The appellants' railway was completed and opened for public use and traffic on the 13th of November, 1849. Previously thereto the appellants gave notice to the respective secretaries of the respondent of the intended opening of their railway, and upon the same being opened they called upon the London and Northwestern Railway Company to keep the accounts stipulated for by the above mentioned agreement. This demand was not complied with.

On the 17th of December, 1849, the appellants filed a bill setting forth all these facts and praying for specific preform-

ance of the agreement. The respondents demurred, and the demurrers were allowed by the Vice-Chancellor of England. An appeal was presented to Lord Chancellor COTTENHAM, who, on the 23d of February, 1850, overruled the Vice-Chancellor's decision (2 Macn. & G., 324). Application was thereupon made that "as the construction of the agreement was a legal question, the defendants might have the opportunity of taking the opinion of a court of law," but the Lord Chancellor postponed any order on that application till the cause should have been heard. An order was, on the 23d of March, 1850, obtained from the Vice-Chancellor of England for an injunction to restrain the defendants from violating the articles of agreement; the defendants (having put in their answer) moved, before the Lord Chancellor TRURO, to dissolve the injunction. His lordship dissolved the injunction, leaving the plaintiffs at liberty to bring such action as they might be advised (3 Macn. & G., 70). An action of covenant was afterward brought in the Court of Queen's Bench; the fifth breach assigned was that the defendants "did evade and elude the covenants and agreements, and each of them in the indenture contained"; and to this breach the defendants, after oyer, demurred generally. The court pronounced judgment for the plaintiffs, holding that the agreement was not illegal or a fraud on the legislature (17 Q. B., 652). Another motion for an injunction was then made, but it stood over till the hearing of the cause. The Master of the Rolls, on the hearing, thought that Lord COTTENHAM must be taken as having inferentially decided that the contract was not *ultra vires;* but his honor held that it had no operation until all the lines had been finished (16 Beav., 441). The case then came on appeal before the Lords Justices, who held that the contract was *ultra vires*, and ought not to be specifically preformed; that if valid it would come into operation, although only a portion of the projected lines had been completed; that the directors of a railway company are trustees of their statutory powers, and that an agreement entered into by them on behalf of the company, amounting to a breach of trust, could not be enforced to the prejudice of the shareholders (4 De G., M. & G., 115).

This was an appeal against that decree. When this case

was called on for argument, Lord ST. LEONARDS and Lord WENSLEYDALE stated that they were shareholders in the London and Northwestern Railway Company, and proposed to retire. The counsel for the appellants said that they should be perfectly satisfied that their lordships should take part in the decision of the case. Their lordships, however, retired.

Mr. Rolt and Mr. Markham Gifford, for the appellants.

There is clearly a power in the directors of a railway company to make an agreement like the present; that general right is given by the 8 & 9 Vict., Ch. 20, § 87; and Lord Chancellor COTTENHAM and the Court of Queen's Bench treated this contract as legal. But then it is said that even assuming it to be legal as a mere agreement, it never came into operation, because the Shrewsbury Union never granted a lease of its "undertaking" to the London and Northwestern, and the agreement was only to take effect "during the existence of the lease"; this objection is invalid. As each one of the lines intended to constitute the Shropshire Union Railway is completed, the Northwestern is to take possession of it and pay a rent for it; Lord COTTENHAM was clearly of opinion that, taking into consideration the provisions of the leasing act, such was the proper and reasonable construction of the agreement (2 Macn. & G., 347). And his lordship was equally of opinion that there had been no fraud in Parliament in this agreement. Two companies, like two traders, may make an agreement of this sort, and the directors of a company, acting for their company, of which they are members, and in the success of which they are interested, may make such an agreement in the sound exercise of the discretion vested in them; the case was therefore put on a too narrow ground by Lord Justice TURNER, when he said that it (4 De G., M. & G., 129), "depends on the true meaning of the words, 'during the continuance of any such lease authorized to be granted by such act,' which are contained in the first clause of the agreement." The cases of the *Great Northern v. The Eastern Counties* (9 Hare, 306), and *Simpson v. Denison* (10 Hare, 51), do not affect the present, nor does that of *McGregor v. The Dover*

and Deal Railway Company (7 Railway Cas., 227), or *The South Yorkshire Company v. The Great Northern Company* (3 De G., M. & G., 576). For all these depended on facts peculiar to each of them, and they show that agreements, which are in contradiction to the express provisions, or the clearly implied intention of the acts creating the company, can alone be treated as invalid: nothing of that sort can be alleged here.

If directors of a company, with a full knowledge of the circumstances (which knowledge they did possess here), enter into a contract, they cannot be relieved against preforming it on any supposition of public policy; and here, too, the parties seeking to compel preformance have done nothing to disentitle themselves to the assistance of a court of equity. *McGregor v. The Dover Railway* (18 Q. B., 618), shows that it is only where the stipulations of a contract made for a company render it clearly illegal, that the courts will refuse to enforce it. The opinion of Lord Justice Knight Bruce was founded on *Mortlock v. Buller* (10 Ves., 292, see, 2 Dow., 515), but that relates only to ordinary trustees, and the directors of a railway company do not bear that character (*Mozley v. Alston*, 1 Phill., 790).

The respondents here cannot be allowed to argue that the agreement has not come into operation, for they have actually received the benefit, which was the consideration given for it, and the appellants cannot now be restored to the situation in which they originally stood. The completion of the whole of the lines is immaterial; the important matter of the agreement was to put the Northwestern Company into possession of the line between Stafford and Wellington, by which it would be best enabled to enter into competetion with the Shrewsbury and Birmingham Company. By force of the agreement the Northwestern Company got possession of that line and has therefore enjoyed all the benefits which the agreement professed or was expected to give. All the arrangements respecting competition had reference to that particular matter, and were introduced almost wholly with reference to that, and to that alone. The fourth clause of this agreement declares that neither party shall evade nor elude this agreement, and in *Lum-*

ley v. Wagner, 1 De G., M. & G., 604, where all the authorities were most fully discussed, the court interfered to prevent the violation of a negative stipulation, although it could not enforce the performance of the whole of the contract itself. A similar principle must be adopted here, and the order for the injuction is at all events perfectly valid.

The Attorney-General (*Sir R. Bethell*) and *Mr. Follett*—(*Mr. Speed* was with them) for the respondents.

This agreement is illegal, being against public policy; it purports to affect only a portion of the line, but if it could be made as to part, why not as to the whole? One railway cannot agree with another to put an end to competition. The legislature grants certain powers to a company to be used for the benefit of the public, and in that way as a means of profit to the company. These powers can only be used in the manner and for the purposes specified in the acts which confer them. The statute 8 & 9 Vict., c. 96, prohibits any railway company from granting or accepting any lease of any other railway created under any act of that session, unless under a provision of an act specifying the names of the parties. That enactment shows that the legislature was adverse to this kind of leases. *Natusch v. Irving*, and other cases cited in Gow on Partnership, 2d Ed., Appendix II, 404, show general principles which are applicable to authority to directors and must regulate this matter. They were practically applied in *The East Anglian v. The Eastern Counties. Company*, Rail. Cas., 150, 11 C. B., 775; *The Great Northern v. The Eastern Counties*, 9 Hare, 310; *Gage v. The Newmarket Railway Company*, 18 Q. B., 457; *Macgregor v. The Dover & Deal Railway Company*, 18 Q. B., 618; *Beman v. Rufford*, 7 Railw. Cas., 48; *Meyers v. Watson*, 1 Sim., N. S., 528; *The Mayor of Norwich v. The Norfolk Railway Company*, 4 Ellis & B., 397. [The LORD CHANCELLOR: *Prima facie*, a corporation may contract under seal. You must show that the particular contract is one which the corporation has no power to enter into. It must be shown on the face of it to be a breach of duty, something foreign to the ob-

ject for which the company was established.] This agreement clearly falls within that description, for its object is to hand over to one company the business to transact which it had received the authority of the legislature.

Then, again, the agreement is void for want of mutuality, for while it binds the Northwestern Company forever, it only binds the Shrewsbury and Birmingham Company during pleasure. It is, besides, so grossly impudent and unfair with relation to the interests of the shareholders of the Northwestern Company that equity will not enforce it.

Then comes the important question, whether the obligations of the agreement had arisen at the time of filing the bill.

The act was recited in the agreement, but the act did not authorize any such lease as was there described, nor any lease except a lease of the whole undertaking. The operative words of agreement being plain, they cannot be controlled by the mere recital. Lord COTTENHAM, when the case was before him, said that the act itself became a lease of a part of the line, and that therefore when the line between Shrewsbury and Stafford was completed, that line became thereby leased, and in that way he dispensed with the certificate of the railway commissioners. But that mode of viewing the question was altogether incorrect, for it was using the recital to explain and extend the contract. Again, if he was right, the Court of Queen's Bench was in error, for that court, though it supposed that such a lease might be valid, held that no action was maintainable without the direct allegation that a lease had been granted, and that there had been an entry under the lease. Now, no such averment could be made, as to the whole of the line, for it had not been completed, and no lease of it had been or could then be granted. That the two things are very different is shown by this, that under the lease there would be power to fix the tolls, but that till the lease is granted no such power exists. And the 26th section of the 10 & 11 Vict., c. 222, shows that when the lease has been granted the Northwestern Company is to defray all the charges of working the line, as well as to pay a rent for working it. The 31st section prohibits the Shropshire Union Company from granting a lease until there has been a cer-

tificate from the commissioners of railways, but the judgment of Lord COTTENHAM altogether strikes that provision out of the act, and gives effect to the agreement, although the condition on which it is to take effect; namely, the granting of a line by Shropshire Union Company, has not been performed. The act of Parliament is divisible into two parts: one part defines what shall be the relation of the lessor and lesse under the lease to be granted; the other consists of a variety of provisions relating to the powers of the Shropshire Union Company and the Northwestern Company, in the intermediate period pending the construction of the lines, and until the lease of the whole undertaking is granted. These relations are entirely different during the two different periods.

The thing to be performed is thus incapable of being clearly and undoubtedly pointed out, and in such a case a court of equity will not decree specific preformance which is not the absolute right of a suitor, but is governed by the discretion of the court (*Meyers v. Watson*, 1 Sim., N. S., 528), but will leave the party seeking it to his remedy at law. The court must in like manner refuse to continue the injunction granted by Lord COTTENHAM restraining the Northwestern from entering into a competing traffic. No one can truly say what this competing traffic is, for when a man is at Birmingham, and is going to Shrewsbury, he can no more be said to belong as a passenger to the Shrewsbury than to the Northwestern line. He may go by either at his convenience. Here, however, there was no evidence of undue competition on the part of the respondents, while there was ample evidence to show that the appellants carried on a competition which was intended on all sides to be prohibited. The amalgamation of the Shrewsbury and Birmingham with the Great Western involved the necessity of the complete determination of the agreement of the Northwestern, for it was essential to that agreement that the Shrewsbury and Birmingham Company should preserve the right of using the Stour Valley line, without which the Northwestern Company could not operate in the manner proposed, not even in carrying to Rugby, and this right was expressly put to an

end by the enactments contained in the 12th section of the 10 & 11 Vict., c. 120.*

Mr. Wilcock appeared for the Shropshire Union Company, but as he adopted the argument of the Attorney-General for the Northwestern Company he was not heard.

Mr. Rolt replied: An agreement of this kind may be legally made. The 8 & 9 Vict., c. 96, only prescribed the adoption of a certain form with respect to those contracts which the 8 & 9 Vict., c. 20, § 87, had permitted.

The agreement came into operation as each portion of the line was completed. The first section of the 10 & 11 Vict., c. 121, speaks not only of "the completion of the works of railways," but also of "such earlier period as may be agreed on by the same companies," as the time of which the lease may be granted and accepted; and the 11th section expressly says that "when and as each of the railways shall be completed and opened," it shall be worked by the Northwestern; and the 19th section makes the rent payable when "any of the said railways shall have been completed." The lease, therefore, so far as this agreement is concerned, is in force, and "during its continuance" this agreement must be performed.

The Lord Chancellor, after very fully stating the facts of the case and the various proceedings in the courts below, said: I have given to this case my most anxious attention, and I have come to the conclusion that the Master of the Rolls was right in the construction which he put on the statute and on the articles of agreement, and that the bill was, therefore, properly dismissed by him.

It appears to me clear that the act only authorized the granting of one lease, *i. e.*, a lease of the whole undertaking. The only section expressly authorizing the grant of a lease is

* The act recited a previous act for making the Stour Valley line and giving the use of it to the Shrewsbury and Birmingham Company, and there contained this proviso: "*Provided*, that the power hereby conferred on the Shrewsbury and Birmingham Company shall cease and be void, in case said company shall be leased to, or purchased by, or amalgamated with, the Great Western Company," etc., etc.

the first section. [His lordship read it.] Therefore, the first section was a section authorizing and compelling the Shropshire Union Railways and Canal Company, when the three railways should be completed, or sooner (upon their obtaining a certain certificate), if both parties agreed to grant, and imposing on the Northwestern Railway Company the duty of accepting a lease of the undertaking (which means the whole undertaking), at a rent ascertained in a particular mode. [His lordship then read the second, eleventh and nineteenth sections.] It thus appears that the lease was to be granted on the completion of works, *i. e.*, the whole of the works of the three railways, or at such earlier period as might be agreed upon. But, then, by a subsequent clause, section thirty-one, this power of agreeing to the grant of the lease before completion of the works, is restrained by an enactment that no lease shall be granted until it shall have been proved to the satisfaction of the commissioners of railways that one-half of the capital has been actually paid up and expended, *i. e.*, one-half of the capital to be raised for the purpose of constructing the three railways. These enactments seem to me clearly to point to one lease, and to one lease only, and that a lease of the whole undertaking, and I can discover nothing in the act authorizing any other lease. Section two provides that from the passing of the act the undertaking shall, subject to the provisions of the act, be managed by a joint committee, consisting of eight directors of the Shropshire Company and eight of the Northwestern Company; and they, by subsequent sections, are to superintend the construction of the railways and the raising of money for the purpose under the powers given to the Shropshire Company.

Although, however, the lease was to be a lease of the whole undertaking, yet it could hardly happen that all the three lines would be completed at the same time; and, therefore, it became necessary to provide for the course to be pursued, as each of the three lines should from time to time be completed. This is provided for by section eleven, which I have read. This section provides that as each railway is completed, the Northwestern Company shall be put into possession of it, and shall work the same under the direction and superintendence of the

joint committee. And, then, section nineteen, which I have also read, provides for the amount of rent to be payable during this period of intermediate enjoyment. The amount of rent is not, it will be observed, a rent dependent merely on the amount of capital expended in the formation of the completed railway. The rent to be payable on the completion of whichever of the three lines shall be first completed, is to be not merely the amount of interest on the capital expended in the formation of the completed railway and on the money, if any, borrowed for that purpose, such interest being calculated at the rate stipulated for in the first section, but also the amount of interest on the whole of the canal capital. So, again, when a second line is completed, the rent for that second line is to be not merely the amount of interest on the money employed in its formation, but also one-half of the interest payable on the canal debt. And the aggregate of these two rents thus ascertained is to be the rent payable until the rent to be reserved on the lease shall become payable, *i. e.*, until the third line is completed, when the rent stipulated for in the first section shall become payable.

I think it clear, attending to these different provisions, that the legislature contemplated but one lease, and that a lease of the whole undertaking; but that, in the meantime, as each railway was finished, the Northwestern Company was to be put into possession of it, subject, however, to the control of the joint committee, and paying a rent calculated according to the provisions contained in the nineteenth section.

If on the completion of one of the three lines, the Shropshire Company had granted a lease under its common seal to the Northwestern Company, it would have been doing, or attempting to do, something *ultra vires*. A railway company certainly cannot grant a lease except when it is authorized to do so by Parliament, and though by the terms of the 11th section the Northwestern Company is entitled to possession of each line as it shall be completed, paying a rent to the Shropshire Company, yet the Northwestern would hold not strictly as lessee deriving title under the Shropshire Company as lessor, but by virtue of the special provisions of the act of Parliament. I think, therefore, that inasmuch as the whole

undertaking had not yet been completed, the time had not arrived when the Shropshire Company had authority to grant a lease.

But assuming this to be so, still it was argued that the question is not whether the Northwestern Company, from the time when it was put into possession under the 11th section, was holding under a lease, but whether the holding under the provisions of the 11th and 19th sections of the act, is or not what was intended by the articles of agreement under the words, "during the continuance of any lease authorized by the act." It was contended at your lordship's bar, that even though there was not authority to grant a lease of one only of the lines before the others were completed, yet the covenants were clearly meant to be in force as soon as the Northwestern Company should be, whether as lessee, or by any other title, in actual possession of the line between Shrewsbury and Stafford. It was the possession of that line which would enable the Northwestern to enter into competition with the Shrewsbury and Birmingham Company, and therefore it was argued that the covenants which were intended to prevent the ill consequences of competition, must have been meant then to come into operation. This, my lords, is a part of the argument which appeared to me to have the greatest force. But after much consideration I have come to the conclusion that it cannot be supported.

The articles of agreement recite the introduction into Parliament in the then last session of a bill "for authorizing a lease in perpetuity of the undertaking of the Shropshire Union Company to the Northwestern Company," and that "the same was opposed by the Shrewsbury and Birmingham Company," and that before the passing of the act, "the Shrewsbury and Birmingham Company agreed to withdraw their opposition," on an agreement "that the covenants hereinafter contained should be entered into on an act being obtained, authorizing such lease as aforesaid" (*i. e.*, a lease of the undertaking, which means the whole undertaking), "or a lease of any part of the undertaking between Shrewsbury and Stafford." Then it is recited that such an act was obtained dur-

ing the last session of Parliament, and then the three parties to the articles enter into the covenants therein contained.

The covenants, therefore, were to be entered into on the happening of either of the two covenants, either on the passing of an act authorizing a lease of the whole undertaking, or on the passing of an act authorizing the lease of the line between Shrewsbury and Stafford; for that, I think, must have been what was intended by the words (inaccurate no doubt) "a lease of any part of the undertaking between Shrewsbury and Stafford." The articles then recite that such an act was obtained. And this is true, because an act was obtained according to the first alternative, *i. e.*, an act authorizing a lease of the whole undertaking. The covenants, therefore, were to be entered into, and accordingly the directors of the Northwestern Company covenanted that "during the continuance of any such lease authorized to be granted by such act," they would do that of which the bill in this cause seeks the specific performance. The question is, what lease is there referred to? It must be the lease which had been referred to in the recital as the lease which had been authorized by the act, and that was a lease of the whole undertaking. This is the strict construction of the language used, and an adherence to its literal meaning leads to no absurdity or inconvenience. It does not, it is true, give rights to the appellant in circumstances which we may consider were substantially the same as those in which both parties would have been placed if the whole undertaking had been completed, and a lease of it had been granted pursuant to the act. But, on the other hand, the Northwestern directors may well say that they would not have bound themselves by any covenant more extensive than what the words import, and would not have agreed to have fettered their free agency as to the management of their concerns if the restriction were to arise before the whole undertaking was actually demised to them. There is nothing to guide us to the meaning of the parties except the language which they have used. It may be that the construction I put upon this language is one which confers less benefit on the Shrewsbury and Birmingham Company than that company had looked for. But the answer is:

it gives all which the words import, and it may be all which the other parties to the contract intended.

I think, moreover, it is right to add that there appears on the face of the agreement itself a stipulation which seems to show that its framers must have looked to a lease more extended than that which should be confined to the line from Shrewsbury to Stafford. The third clause or section of the articles provides, amongst other things, "that during the continuance of any such lease as aforesaid, the Northwestern Company shall not use the line of the Shropshire Union Company by Gnosall or Stafford to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway." Now, one of the three projected railways which were to form part of the whole undertaking to be eventually leased to the Northwestern was a line running from the north through Gnosall and Wolverhampton. This formed no part of the line from Shrewsbury to Stafford, and therefore the engagement by the Northwestern directors that "during the continuance of any such lease as aforesaid," they would not use the line by Gnosall to compete with their rivals necessarily presupposes that "such lease as aforesaid" would be a lease which, but for this stipulation would enable them to compete by the line from Gnosall, *i. e.*, that the lease referred to in the articles is a lease which would include the direct line from Gnosall to Wolverhamton, and this must be the lease of the whole undertaking. I do not forget that the line from Shrewsbury to Stafford runs through Gnosall, and so it may be said that the stipulation might refer to traffic passing through Stafford, but this is not a reasonable construction of the agreement, if we bear in mind that a part of the general undertaking was the line direct from Gnosall to Wolverhamton, and that the mention of Gnosall was altogether unnecessary if the traffic referred to was only that which goes round by Stafford.

I am therefore of opinion, with the Master of Rolls, that the time had not arrived when the covenants entered into by the respondents had come into operation, and so that he properly dismissed the bill.

This view of the case is, as I conceive, strictly conformable

to the judgment at law of the Court of Queen's Bench. For that court held that no action could be maintained for a breach of any of the covenants, except that for evading or eluding the contract, without a distinct averment that a lease had been granted pursuant to the act, and from what passed on the first argument, when leave was given to amend, it is plain that the court considered that without an averment, not only that the lease had been granted, but also that the Northwestern Company had entered and was possessed of the line by virtue of the lease, no action could be maintained; in other words, that in order to maintain an action, it was not enough to show that the Northwestern Company had entered into and was in possession under the provisions of the 11th section of the leasing act, but that the plaintiffs must show further that the possession of the Northwestern Company was, by virtue of a lease, granted in pursuance of the act.

This being the ground on which I recommend your lordships to affirm the judgment below, it is not, in strictness, necessary for me to express any opinion as to the grounds on which the case of the appellants failed before the Lords Justices. But it is due to those very learned judges to say that I by no means wish it to be understood that I have formed an opinion adverse to that which either of them took of the case. Lord Justice TURNER was of opinion that the contract sought to be enforced was *ultra vires* of the contracting parties. There have been a great many cases on this subject, *i. e.*, what contracts are and what are not *ultra vires* of a railway company established by act of Parliament.

I agree to the proposition urged by the appellants, that, *prima facie*, corporate bodies are bound by all contracts under their common seal. When the legislature constitutes a corporation it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case when the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*. And the question here, as in similar cases, is, whether there is anything on the face of the act of incorporation which

expressly or impliedly forbids the making of the contract sought to be enforced.

There is abundant authority to show that there are many contracts into which, without express authority, a railway company cannot enter. The Railway Clauses Consolidation Act (the 8 Vict., c. 20, § 86) authorizes every such company to run carriages and generally to act as a carrier on its own line of railway, and by the next section the company is enabled to make arrangements with other companies having continuous railways, for the use of their respective lines for their mutual benefit. All this would have been unnecessary if it had not been considered that but for such enactments no such power would have existed under the mere incorporation of the company for the purpose of making and maintaining a railway. The principle has been often recognized and acted on in the courts of law and equity. In the case of *The East Anglian Railways Company v. The Eastern Counties Railway*, it was held by the Court of Common Pleas that no action could be maintained on the covenant of the defendants to accept a lease of the railways of the plaintiffs to find the capital for constructing the railways and to pay the cost of promoting certain bills then pending in Parliament. The covenant was held to be void, being a covenant to do acts not within the object of the incorporation.

In a subsequent case; viz., *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company*, 9 Exch., 75–84, the same proposition is stated more correctly, perhaps, by Mr. Baron PARKE. He there says that where "a corporation is created by act of Parliament for particular purposes with special powers, their deed, though under their corporate seal, does not bind them if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactment that the deed is *ultra vires*, that is, that the legislature meant that such a deed should not be made." I think this is the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with corporate duties, or

that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into.

The numerous cases in equity in which the court has restrained a company from devoting any part of its funds to purposes not strictly within the objects of its incorporation have been decided on similar principles. It is sufficient to refer to the cases of *Coleman v. The Eastern Counties Railway Company*, 10 Beav., 1 (4 Railway Cas., 513); and *Bagshaw v. The Eastern Union Railway Company*, 7 Hare, 114 (2 Macn. & G., 389). In the former case Lord LANGDALE sustained an injunction restraining the defendants from applying any part of their funds towards the establishment of a steam packet company, which they considered, and probably justly considered, would be likely to benefit their line. And in the latter case it was decided that money raised for the purpose of completing a particular branch line, could not be applied to the purposes of any part of the main line.

The court, in those and similar cases, has considered (to apply the language of Mr. Baron PARKE) that, by reasonable inference from the nature of the incorporation, the legislature intended that no such appropriation of the funds as the company contemplated should be made.

I will only add that in the case of *The Helmsburgh Harbor Trustees v. The Caledonian Railway Company*, 2 Macqueen's Sc. App. Cas., 391, your lordships, last year, acted on the same doctrine.

Lord Justice TURNER was of opinion that the doctrine in question was applicable to the present case; that the contract sought to be enforced was one not authorized by the terms of incorporation. I confess that, were it not for the very high authorities opposed to the opinion of the Lord Justice, I should have been inclined to attribute great weight to it. The contract on the part of the Northwestern Company is a contract to give up to the Shrewsbury and Birmingham Company seven-thirteenths of the profits made by the carriage of passengers and goods over a portion of their line, in consideration of receiving in return six-thirteenths of the profits made by the Shrewsbury and Birmingham Company on a certain portion

of that line. But if this could be done on a portion of the line, why, it was urged at the bar, not on the whole? The doctrine of the respondents, it was contended, would necessarily lead to the conclusion that the Northwestern Company and the Great Western Company might, if they chose, agree to bring all their profits into a common fund, and divide them among their respective shareholders in any definite stipulated proportion. This is a question of very great importance. The opinion of the Lord Justice TURNER seems to be opposed to that of Lord COTTENHAM, and I cannot reconcile it with the judgment of the Court of Queen's Bench on the argument of the demurrer to the fifth breach, for that demurrer clearly raised the question whether the contract for division of profits was or was not a legal contract. In this conflict of opinions, if it had been necessary to decide between them, I should probably have advised your lordships to require that the case on this point should be re-argued in the presence of the learned judges, in order that we might have their assistance. But, as I have already stated, I think there is another ground on which your lordships must decide against the appeal, so that the further discussion of the doctrines on which the Lord Justice TURNER rested his judgment is unnecessary.

The ground on which Lord Justice Knight BRUCE rested his judgment was, that even supposing the covenant was not legally invalid, as being *ultra vires*, as to which he expressed no opinion, still it was one to the enforcing of which a court of equity ought not to lend its assistance, being palpably so unequal, and, therefore, so unjust in its operation as fairly to lead to the inference that its effect could not have been fully apprehended by the parties, or at all events, by the party against whom it is sought to be enforced.

It is obvious that if the Northwestern Company is bound by this covenant the Shrewsbury and Birmingham Company ceases to have any object in carrying passengers or goods to Rugby, or beyond Rugby to London. Indeed, it is manifestly the interest of the company not to do so, for it would be incurring all the expense of running carriages over the line, on their way to Rugby and the south, without any possible countervailing benefit. By the terms of the contract the

Shrewsbury and Birmingham Company is to have seven-thirteenths of the profits of so much of the through traffic carried by the Northwestern Company, as is attributable to the distance from Shrewsbury to Stafford, and it is also to have seven-thirteenths of so much of the through traffic on its own line as is attributable to the distance from Shrewsbury to Wolverhampton. The effect of this arrangement obviously is to prevent the Shrewsbury and Birmingham from having any interest in carrying traffic by its own line. If the directors of that company were to cease altogether to carry passengers or goods beyond Birmingham, the result must necessarily be that all the traffic from Shrewsbury to Rugby and the south must go *via* Stafford, and be conveyed, therefore, by and at the cost of the Northwestern Company without any cost whatever to the Shrewsbury and Birmingham Company, and yet for all this traffic so conveyed the Shrewsbury and Birmingham Company would be entitled to precisely the same proportions of profits as if the goods and passengers had been carried over that line, and at the expense of that company. And on the other hand the Northwestern Company would be bound to hand over to the Shrewsbury and Birmingham Company seven-thirteenths of the profits derived from the working of a portion of the Northwestern line without receiving any corresponding share of profits from the Shrewsbury and Birmingham Company. It is difficult to suppose that this could have been intended, more especially as it is a contract binding forever on the Northwestern Company, though the Shrewsbury and Birmingham Company has the right of abandoning it at any time. The effect of the arrangement was to divert from its legitimate channel no considerable portion of the profits of a particular part of the line of the Northwestern Company without securing any corresponding portion of profits from the rival line. It, therefore, seems to me that there is great force in what is said by Lord Justice Knight Bruce; namely, "that the contract, whether legally valid or invalid is one which a court of equity ought not to be active in enforcing."

I have thought it right to make these observations, but I must repeat that the ground on which I advise your lordships to reject this appeal is that whatever be the character of the

covenants in question, the time had not arrived at which they were to come into operation. This extends to the whole case, and I shall, therefore, move your lordships to dismiss the appeal with costs.

Decrees and orders appealed from affirmed, and appeal dismissed with cost.

NOTES.

Specific performance, when decreed.—In the case above set forth the court refused to decree a specific performance of an agreement, where if it was not void as *ultra vires*, it was at least unfair to the shareholders of one of the companies. But in a previous case, *Eastern Counties Railway Co. v. Hawkes*, 5 H. L., 331; affirming the judgment of Knight BRUCE V. C. and ST. LEONARD, L. C., 22 L. J., Ch., 77, the court sustained a bill for a specific performance under the following circumstances. The company having a bill before Parliament for enabling it to construct a railway from Wisbeach to join the Great Northern Railway at Spalding, entered into an agreement with Hawkes, a land-owner on the proposed line, by which and in consideration of his withdrawing his opposition to the bill, to purchase of him a house and six acres of land, in which he had only a life estate, with remainders over, for the price of 8,000*l.* and 5,000*l.* as additional compensation, and also undertook to obtain all the necessary powers and authority to enable said Hawkes to sell the estate. The bill passed, without any special powers given to the corporation in reference to the Hawkes estate, but the company, under its general powers, could have taken two acres of the estate. The company subsequently abandoned the contemplated line, and gave said Hawkes notice that they should not require the estate. Hawkes thereupon, and before the time the compulsory powers of the company had expired, filed a bill for a specific performance against the company. It was held by the Vice-Chancellor, and the Lord Chancellor, that the contract was good and binding upon the company; whereupon, the latter appealed to the House of Lords, where it was also held to be neither illegal nor *ultra vires*, and the decree for a specific performance was therefore affirmed.

Usually exercised to restrain.—The powers of courts of equity have usually been invoked to restrain the execution of *ultra vires* acts by corporations. Thus, in *Coleman v. The East Anglian Railways Company*, copied in full in this chapter, the court restrained the directors of the company, at the instance of a shareholder, from applying any part of its funds in assisting a company which had been formed to run in connection with the railroad company to and from its terminus at Harwich, and for establishing a steam communication between there and the northern ports of Europe.

In *Salomon v. Laing*, 12 Beav., 339, the directors of the South Coast Rail-

way Company were restrained from applying any part of the funds of that company in the purchase of shares of another company by which purchase the defendants hoped to benefit the company of which they were directors, the court holding that they had no right to deal with its funds in that manner.

In the case of *Bagshaw v. The Eastern Counties Railway Company*, 6 Railw. Cas., 152, the same question was presented; viz., as to the right of the shareholders to restrain the misapplication, or intended misapplication, of corporate funds by the directors of the company. An act of Parliament had authorized the defendants to raise, by way of additional shares, two sums of 200,000*l.* and 100,000*l.*; the former for the purpose of enabling them to construct a branch line to Harwich, and the latter for enabling them to purchase and complete a lateral line to Hadleigh. The plaintiff had purchased scrip certificates for shares in these undertakings, or one of them, on which all calls had been paid, and the plaintiff stated in his bill that although the whole of said two sums had been raised the company had abandoned the intention of constructing the Harwich line and were about to apply the amount so raised to other purposes.

The bill prayed, amongst other things, a general account of all sums so applied; that the directors might be decreed personally to make them good, and for an injunction to restrain any further misapplication of any part of said sums so raised. To this there was a general demurrer, which was overruled. On appeal this decision was sustained by Lord COTTENHAM on the ground that the directors had no right to expend any part of the money so raised upon any object other than that for which it was raised.

In *Eastern Counties Railway Company v. Hawkes*, *supra*, it was held that the contract was not *ultra vires* in the sense that it was wholly beyond the power of the company to make such a contract. But it was urged that it was *ultra vires*, as it was a purchase of lands not wanted or of more than was required by the company for any legitimate purpose.

On this question Lord Chancellor CRANWORTH observed: "The contract was not necessarily, and on the face of it, *ultra vires*. Besides, the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole, if the plaintiff required them to do so; and it is a reasonable inference that the contract to purchase the whole was made, because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid as being beyond their powers; for as argued at the bar, it could be no answer to an action for iron rails bargained and sold that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of future use on a speculation that iron was likely to raise in value."

The doctrine of this case had been previously recognized in *Webb v. The Direct London, etc.. R. Co.*, 1 De G., M. & G., 521, and *Stuart v. The Lon-*

don & N. W. R. Co., Id., 721; and *Gage v. The New Market, etc., R. Co.*, 18 Q. B., 457, which were suits for the specific performance of contracts, but they were decided against the plaintiffs on other grounds.

Where the contract is within the scope of powers thereafter granted.—The question in England as to the extent to which the promoters of a railway corporation can, by contracts in contemplation of incorporation, bind the corporation, seems quite unsettled. We have seen, by the foregoing cases, that the courts there have decreed a specific performance in cases when the contract so entered into was within the scope of the powers of the company thereafter organized. The tendency of the English decisions seems to limit the enforcement of such contracts to such as are necessary to carry out the purposes and within the scope of the charter when granted. *Taylor v. C. & M. R. Co.*, 2 L. & Eq., 366; *Preston v. Liverpool & Man. R. Co.*, 5 H. L., 605; *C. & D. J. R. Co. v. H. H. Trustees*, 39 Eng. L. & Eq., 28; *Petrie v. Eastern Counties Railway Company*, 1 Rail. Cases, 462.

The decision in *Preston v. Liverpool, etc., supra*, held that where the projectors of a railway company, in order to induce a land-owner to withdraw his opposition to their bill, entered into a contract with him, in which there was a stipulation that the contract was to be performed by the company after it should have obtained an act of incorporation from Parliament, it was essential to the validity of the contract that it be one which the company could lawfully make after its incorporation; and that it was *ultra vires* of a corporation established for the purpose of constructing a railway, to enter into a contract to pay a large sum of money to a man for not opposing the passing of a bill for its benefit in Parliament. But these conclusions in the decision appear to be mere *dicta*, as the court further held that the contract, if not *ultra vires*, did entitle the plaintiff to the specific performance claimed in the bill. The *dicta* of the court, however, would appear to be at variance with decisions in several other cases. See *Stanley's Case*, 3 Myl. & C., 773; 1 Rail. Cas., 58; *Petrie v. Eastern Counties Railway Company, supra.*

Issue of scrip by promoters.—It seems well settled in England that the projectors of corporations may issue scrip which entitles the holder or his assignee to become a member of the proposed company when incorporated. The consideration for the issue of the scrip is the obligation of the party taking it to take shares in the future company, and this obligation is binding upon him, even though he assign the scrip, at least until the name of the purchaser be entered upon the register. Field on Corp., § 122; *Midland G. W. R. Co. v. Gordon*, 16 M. & W., 804; 16 L. J. Ex., 166. But, see *Jackson v. Crocker*, 4 Bev., 59.

Contracts in anticipation of legislative authority in this country.—It is questionable if the doctrine in England, applicable to contracts made by promoters of bills in Parliament for the charters of corporations, are applicable to contracts made in anticipation of charters in this country. *Morris & Essex R. Co. v. Sussex R. Co.*, 20 N. J. Eq. (5 Green), 542. There they have preliminary associations of individuals, whose acts are unrestricted save only by their provisional deeds. But even there, as

we have noticed, they are limited in their powers within the scope of the authority granted by the charter.

In *Strasburgh R. Co. v. Echtenacht*, 21 Pa. St., 220 (1853), which was a suit to recover on a subscription made to the shares of stock of a contemplated corporation, not yet organized, BLACK, C. J., observes: "Before the Strasburgh Railroad Company was incorporated, the defendant and others signed a paper agreeing that if it should be incorporated with certain privileges, they would subscribe the number of shares set opposite their respective names. The charter was obtained and the defendant refused to take the stock, whereupon the company brought this bill in equity to enforce specific performance of the contract.

"A contract cannot be made by one person alone. It takes two to make a bargain. Before a promise becomes a binding obligation, it must not only be made to, but must be expressly or impliedly accepted by, the party for whose benefit it was meant.

"The paper before us is no more than a naked expression of the subscriber's intention to purchase certain shares in the capital stock of a company, which it was expected would be incorporated by the legislature. Besides it is without any sufficient consideration. It is not pretended, and cannot be made out from the paper that the agreement of the defendant was the motive for the others for taking stock. It is well settled that procuring legislation of any kind is not a consideration which will support even a direct promise to pay a fair compensation for the labor of the promise about such a business.

"Again: If there was a binding engagement, it was not made with the railroad company which did not exist at the time.

"But supposing this to have been a valid contract, to which the plaintiff was a party, and based upon good consideration, a bill in equity is not the mode of enforcing it; the remedy at law for its violation being full, complete, and adequate."

The contrary doctrine has, however, been frequently affirmed under statutes providing for incorporation. "In this country preliminary subscriptions may generally be made, and in such cases the rights secured thereby become vested in the corporation when formed, as the right to membership thereby pledged is sufficient consideration for such subscription, and the company generally may recover calls on such subscriptions after its incorporation the same as though made after its complete organization. In fact, it is frequently required in organizing under general statutes, not only that preliminary subscriptions be made, but that a certain percentage of the sum be paid as a condition precedent to the organization, and these subscriptions, if the corporation is finally organized, become binding upon the subscribers, whether scrip is issued therefor or not, and they become a part of the assets of the corporation." Field on Corp., § 122. See, also, *Griswold v. Peoria University*, 26 Ill., 41; *Johnson v. Ewing Female University*, 35 Id., 518; *Anderson v. Newark, etc., R. Co.*, 12 Ind., 376; *Johnson v. Wabash, etc., R. Co.*, 16 Id., 389; *Heaston v. Cincinnati, etc., R. Co.*, Id., 275; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y., 336; *Eastern P. R. Co. v. Vaughn*, Id., 546; *Lake Ontario R. Co. v. Mason*, 16 Id.,

451; *Rensselaer P. R. Co. v. Barton*, Id., 457; *Stanton v. Wilson*, 2 Hill, 153; *Hamilton, etc, R. Co. v. Rice*, 7 Barb., 157; *Reformed Church v. Brown*, 29 Id., 335; *Penobscot & C. R. Co. v. Dummer*, 40 Me., 172; *Walkins v. Eames*, 9 Cush., 537; *People's Ferry Co. v. Balch*, 9 Gray, 303; *Danbury, etc., R. Co. v. Wilson*, 22 Conn., 435; *Taggart v. West Maryland R. Co.*, 24 Md., 563.

Contract for right of way.—In *New Haven & Northampton R. Co. v. Hayden*, 107 Mass., 525, several persons signed a writing in which they undertook to secure subscriptions to the stock of a railroad corporation to a certain amount and pay for the same in installments, and also proposed to secure a right of way for the extension of the railroad, free of expense to the corporation, and to obtain the legislation needful to carry out the proposed extension, which was not to be binding unless they could secure the right of way or make such arrangements as should be satisfactory to the corporation.

The corporation accepted the proposal, having no authority at the time to extend the railroad, but subsequently obtained authority from the legislature. The signers afterwards agreed in writing that the railroad company might go forward and secure the right of way, without prejudice to the rights of either party; and it then purchased the right of way. In an action by the corporation against the signers for the failure to secure the right of way, the defendants claimed that the contract was void, as the plaintiffs had no power to make it. But the court held it binding upon them. The court say: "It was in substance an agreement to do something not at the time legal, but which the passing of an expected statute would render legal; and both parties must have understood that if the sanction of the legislature should be withheld the contract would not go into effect. The contract does not import that the plaintiffs bound themselves to construct the road at all events and without legislative authority. * * * In this view of the case, we think that the objection that the plaintiffs had no legal authority to extend their road, and that the agreement to do so is therefore void, is wholly untenable."

Reference was made also to various English authorities sustaining the same doctrine. See *Scotch Northeastern R. Co. v. Stewart*, 3 Macq., 382; *Mayor of Norwich v. Norfolk R. Co.*, 4 El. & Bl., 397; *Taylor v. Chichester & M. R. Co.*, 4 H. L. 628.

ILLUSTRATION OF THE DOCTRINE IN ITS APPLICATION TO SUITS IN EQUITY, TO CANCEL DEEDS, ETC.

FOURTEENTH SELECTED CASE.

MINERS' DITCH CO. v. ZELLERBACH & POWERS.*

DEALING WITH A CORPORATION.—The rights of strangers, dealing with a corporation, may vary according as they are considered with reference to the corporation itself, its creditors or the stockholders of the corporation.

DIFFERENT KINDS OF CORPORATIONS.—There are three classes of corporations; to-wit., public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike, and canal companies; and corporations strictly private.

WHEN ACTS OF CORPORATION ARE ULTRA VIRES.—The term *ultra vires*, when used in reference to corporations, is employed in different senses. An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances; and an act is also said to be *ultra vires* with reference to rights of certain parties, when the corporation cannot perform it without their consent; and it may also be *ultra vires* with reference to some specific purpose when the corporation cannot perform it for that purpose.

Idem.—When the act of the corporation is *ultra vires* in the first sense mentioned, it is void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second and third senses, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.

WHEN CORPORATION MAY REPUDIATE ITS CONTRACT.—In a contract between a corporation and strangers dealing with it, when the act in question is one which the corporation has no power to perform under any circumstances, the corporation may avail itself of the defense of *ultra vires*; but when the act may be performed by the corporation for some purposes, but not for others, the defense of *ultra vires* may or may not be available. If the stranger dealing with the corporation knew of its intention to perform the act for an unauthorized purpose, the defense is available, otherwise not.

CORPORATION MAY SELL ITS PROPERTY.—A corporation organized for the purpose of owning ditches for the conveyance and sale of water, possesses the power of selling and conveying all its corporate property, pro-

*Reported in 37 Cal., 543 (1869).

vided the sale is made for corporate or lawful purposes, and strangers taking a conveyance have a right to assume, as against the corporation, that the sale was for a lawful purpose.

Idem.—If the corporation contests the validity of such sale on the ground that it was made for an unlawful purpose, it devolves upon it to show that the party making the purchase knew of such unlawful purpose.

Idem.—Such sale may be made to any person, natural or artificial, capable of taking, and the stockholders of one or more corporations may form themselves into a new corporation, and the property of one or both of the old corporations may be conveyed to the new corporation.

DEED OF CORPORATION.—Where a deed purporting to be the deed of a corporation is signed by its trustees as trustees, and has the corporate seal affixed, it is admissible in evidence as a deed of the corporation, and is itself *prima facie* evidence of the regular and duly authorized execution of the same.

Idem.—It devolves upon the party contesting the validity of such deed to overthrow the presumption that it was regularly and duly executed.

RIGHT OF CORPORATION TO CONTEST ITS OWN SALE.—Where a corporation sells and conveys all its property for an illegal purpose, the contract being fully executed on both sides, and the property is afterward purchased by a stranger with knowledge of that fact, in an action against such stranger to recover the property, the corporation cannot avail itself of the invalidity of the transaction to defeat the conveyance.

ILLEGAL SALE OF CORPORATION PROPERTY.—Conceding it to be unlawful for a corporation to make a sale of all its property to another corporation, and receive in payment therefor the stock of the grantee to be distributed among its own stockholders, yet, if such sale is made, and the contract fully executed, the corporation itself cannot recover back the property sold, or set aside the contract on account of its illegality.

Appeal from the District Court, Fourteenth Judicial District, Nevada county.

THIS was an action to recover possession of the Miners' Ditch, the Poorman's Ditch, the extension of the Poorman's Ditch, the Grizzly Ditch and its branches, the undivided two-fifths of the Eureka Lake Water Company's Ditch, the undivided two-fifths of the Gray Diggings Mining Claims, the undivided two-fifth of the Lewis Mining Claims, the undivided two-fifths of the Isembeck & Co.'s Mining Claims, the undivided two-fifths of the Eureka Lake Water Company's saw-mill, and the land whereon the same stands, together with all and singular the appurtenances to the above named and specified property belonging.

The complaint was in the usual form, alleging ownership of and possession of the property by the plaintiff on the third day of January, 1863, and its ouster by the defendants on the same day. The defendants, in the tenth subdivision of their answer, set up the following as an equitable defense: "And for a tenth further and separate answer to the said several causes of action in the said amended complaint mentioned, and as a ground for the equitable interposition of the court, this defendant avers and shows as follows:

"That on the 14th day of May, 1859, the plaintiff, the Miners' Ditch Company was, and for some time prior thereto had been a corporation duly organized and existing under the laws of this State, and the owner and possessed of the several ditches and parcels of property mentioned and described in the first, second, third, and fourth counts of plaintiff's amended complaint.

"That at the same time another corporation, duly organized and existing under the laws of this State, and styled the Eureka Lake Company, owned and possessed certain other ditch property in said county of Nevada, which said ditches were constructed and used for the purpose of conveying and selling water for mining and other purposes in said county of Nevada and its vicinity.

"That the said Miners' Ditch Company and the said Eureka Lake Company were rival companies selling water in the same market.

"That a large portion of the stock in each of said corporations was held and owned by persons who were stockholders in both of said corporations.

"That at some time in the month of May, 1859, and prior to the 14th day of said month, at a meeting of the board of trustees of the Eureka Lake Company, regularly called and held for the purpose, it was unanimously resolved and determined, by a vote of the said board of trustees, that the president of said corporation, on its behalf, be and thereby was authorized and directed to propose to the Miners' Ditch Company that the several properties of and belonging to the said several corporations be consolidated, and the said corporations united in one, upon certain specified terms.

"That afterwards, on the 14th day of May, 1859, a meeting of the stockholders of the said Miners' Ditch Company, called for the purpose of receiving and considering the proposition of the Eureka Lake Company to consolidate and unite the several properties and companies, as hereinbefore set forth, was held at its usual place of business, at which meeting the president of the Eureka Lake Company, in pursuance of the authority so given to him as aforesaid, did attend, and, on behalf of the said Eureka Lake Company proposed to said Miners' Ditch Company to unite and consolidate the several companies and properties as aforesaid. That, thereupon, the said proposition was accepted and the stockholders of the said Miners' Ditch Company, by a resolution duly passed, authorized and empowered the directors of said company to make the necessary arrangements for and to perfect the union and consolidation of the said companies as aforesaid.

"That at the said several meetings of the stockholders and board of trustees of the Eureka Lake Company, and of the stockholders of the Miners' Ditch Company, it was agreed and determined by vote, for the purpose of carrying into effect the agreement between said corporations for the union and consolidation thereof, and until the final consolidation and union thereof could be perfected, the directors of said several corporations should, as a joint board, temporarily receive and have and hold possession and control of the entire property of said corporations, and jointly conduct the business thereof for and on behalf of such consolidated companies, and until the said consolidated company could be formed, and that such consolidated companies should share the profits and losses of such consolidated properties.

"That soon after the said last named date; viz., on or about the 29th of June, 1859, the said joint board of directors so formed as aforesaid, and pursuant to said agreement, received from said several corporations the possession of all of said property, and took and entered into possession of the same, for and on behalf of said consolidated company, and conducted and managed the same according to the terms of said agreements, on behalf of said consolidated company, and under

the name and style of the Eureka Lake and Miners' Ditch Company, until the formation of the company styled the Eureka Lake Water Company, as hereinafter set forth.

"That during the time the said joint properties were in possession of and under the control of the said joint board, divers large sums of money, arising from the receipts of the said joint properties, were expended in the repairs and improvements of the properties formerly belonging to the said Miners' Ditch Company, and described in the first, second, third and fourth counts of said amended complaints.

"That afterwards, and on or about the month of September, 1860, a meeting of the stockholders of the said Miners' Ditch Company was held at the usual place of business of said company, at which meeting the union and consolidation of said corporations was ratified and confirmed, and by a resolution duly passed it was agreed and determined that, for the purpose of more fully carrying into effect the said union and consolidation the directors of said Miners' Ditch Company were authorized, empowered and directed to unite with the directors of the Eureka Lake Company in the organization of a corporation to be called and styled the Eureka Lake Water Company, and which corporation, when organized, should be the successor in interest of the said Miners' Ditch Company, the said Eureka Lake Company and the joint company—the Eureka Lake and Miners' Ditch Company; and the said directors of the said Miners' Ditch Company were further authorized and empowered to convey to the said Eureka Lake Water Company, when formed, the entire property then lately owned by the said Miners' Ditch Company, upon the consideration that the said Eureka Lake Company should, in like manner, convey to said Eureka Lake Water Company the property then formerly owned by it; and it was then and there further agreed that the stock of such new corporation, the Eureka Lake Water Company, should be issued to the stockholders of the Eureka Lake Company and the Miners' Ditch Company in the proportions agreed upon.

"That at or about the same time as last aforesaid, at a meeting of the stockholders of the Eureka Lake Company, similar resolutions to those so passed at the meeting of the stockhold-

ers of the Miners' Ditch Company were passed, and the directors fully authorized to make the necessary conveyances and documents and to enter into the necessary arrangements for carrying into effect the objects of such resolutions.

"That afterwards, and on or about the 17th day of October, 1860, the directors of the said several corporations, as such joint board as aforesaid, duly organized a corporation in the said county of Nevada under the general laws of this State and under the name and style of the Eureka Lake Water Company.

"That afterwards, and on or about the 25th day of October, 1860, the Eureka Lake Company, by its directors thereto duly authorized, conveyed, transferred and delivered to the said Eureka Lake Water Company full and complete possession of all the property theretofore owned by it; and on or about the 29th day of October, 1860, the said Miners' Ditch Company, by its directors thereto authorized, in like manner conveyed by deed executed under the corporate seal of said company, and duly transferred and delivered to the said Eureka Lake Water Company, full and complete possession of all of the property formerly owned by it, including the property described in the first, second, third and fourth counts of said amended complaint.

"That immediately thereupon the said joint board so holding possession as aforesaid, under the name of the Eureka Lake and Miners' Ditch Company, under the agreements aforesaid, for the benefit of the consolidated company so to be formed under such agreements as aforesaid, gave up and delivered to the said Eureka Lake Water Company, the corporation so formed under the various agreements aforesaid, full and complete possession of all the joint properties so held by them as aforesaid.

"That thereupon the said Eureka Lake Water Company entered into possession of all the said joint properties, including all of the ditches, mining claims and premises described in the said amended complaint, as the successor in interest of the said Eureka Lake Company, the Miners' Ditch Company and of the said joint board of Eureka Lake and Miners' Ditch Company, and from then hitherto until the time hereinafter

set forth continued to hold possession of the same, and to use and enjoy the same as such successor in interest.

"That upon such organization of the Eureka Lake Water Company and such transfers as aforesaid, stock of said company was duly issued to the various shareholders of the Miners' Ditch Company and the Eureka Lake Company in the proportions theretofore agreed upon.

"That after the Eureka Lake Water Company received possession of the various properties as hereinbefore set forth, and previous to the 3d day of January, 1863, it expended large sums of money in purchase of ditches and water rights, and the construction of flumes, ditches, and reservoirs, and other valuable and permanent improvements on the same, amounting in all to between four hundred thousand dollars and five hundred thousand dollars, which improvements greatly enhanced the value of such properties.

"That it so expended in improvements upon the property described in the first, second, third and fourth counts of said amended complaint at least forty thousand dollars. That it constructed and completed the ditch described in the fifth count of said complaint at a cost of over thirty thousand dollars, and purchased the mining claims and property described in the sixth, seventh, eighth and ninth counts thereof.

"That at the time of the transfer of possession as aforesaid, and of the conveyance aforesaid, the Miners' Ditch Company was indebted in large sums of money to various parties, a portion of which indebtedness was secured by mortgages upon said property formerly belonging to said company.

"That in the year 1862 said mortgages were foreclosed, and the mortgaged property ordered to be sold for the satisfaction thereof, and that said property was advertised for sale pursuant to said order.

"That the said Eureka Lake Water Company was then largely in debt, and had no means wherewith to satisfy said mortgages and prevent the sale of said property, and borrowed of this defendant and of the defendant Powers (then partners in business under the firm name of Marks & Co.), the sum of about ninety thousand dollars, which was applied in payment and satisfaction of a portion of said mortgages, and the ac-

crued interest and costs. That prior to the date of this loan the said Eureka Lake Water Company were indebted to this defendant and said defendant Powers in other large sums of money, which were borrowed of them and used for the benefit of the entire property, including the property formerly owned by the Miners' Ditch Company, with the full knowledge and assent of the Miners' Ditch Company and its stockholders and members.

"That on the 7th day of April, 1862, and prior to the foreclosure of the said mortgages of the Miners' Ditch Company, the said Eureka Lake Water Company was indebted to this defendant and defendant Powers in the sum of one hundred thousand dollars, for moneys before that time loaned to the Eureka Lake Water Company and then remaining unpaid; and on said last mentioned day applied to said defendant for the further loan of one hundred thousand dollars, to be used for the purpose of paying off the mortgages upon the property formerly owned by the said Miners' Ditch Company, then in process of foreclosure as aforesaid, and for the further purpose of paying off certain other liens and incumbrances existing against the entire property of said Eureka Lake Water Company.

"That at the date last aforesaid the said Eureka Lake Water Company executed and delivered to this defendant, and his then partner, the defendant Powers, a mortgage upon the entire property of said company, including the property described in the amended complaint, to secure payment of the sum of one hundred thousand dollars, heretofore advanced and loaned as aforesaid, and also to secure payment of such other and further sums, not to exceed in the aggregate the further sum of one hundred thousand dollars, as the said defendant and Powers should thereafter, at the request of said company, advance and loan to it: and at the same time, and in said mortgage, covenanted with this defendant and Powers that they should have and receive the net proceeds of all of said property, to be applied in payment of said mortgage debt until the same should be fully paid.

"That thereafter, and prior to the 3d day of January, 1863, this defendant and Powers, at the request of the said Eureka

Lake Water Company, advanced and loaned to it the additional sum of one hundred thousand dollars, as provided for in said mortgage.

"That at the date last aforesaid, the said Eureka Lake Water Company, having failed to make any payments whatever on account of said mortgage debt, by an instrument in writing, under the seal of said corporation, transferred to this defendant and defendant Powers all of said mortgaged property, and delivered to them the possession thereof and authorized them to keep, manage and control the same, and apply the net proceeds thereof in payment of said mortgaged debt until the same and the interest accruing thereon should be fully paid.

"That immediately thereupon this defendant and defendant Powers took and entered into the possession of all of said property, and retained possession thereof under said agreement, and kept an accurate account of the proceeds thereof, until the 5th day of February, 1865, at which last mentioned date they, the said defendants, became the owners by purchase of all said property.

"That this defendant and defendant Powers so entered into possession of said property as aforesaid, as the successors in interest of the said Eureka Lake Water Company the Eureka Lake Company, the Miners' Ditch Company, and the said joint board, or Eureka Lake and Miners' Ditch Company, and held and possessed the same, as such successors in interest until the time next hereinafter mentioned.

"That on the 1st day of September, 1865, this defendant purchased of the defendant Geo. C. Powers all interest (being the undivided one-half) which he held and owned in said property, so acquired as aforesaid, and all his right, title, and interest, possession, claim, and demand therein.

"That ever since the time last aforesaid this defendant has been in possession of all of said property, claiming title thereto as the successor in interest of the said defendant Powers, and of the Eureka Lake Water Company, the Eureka Lake Company, the Miners' Ditch Company, and the said joint board or Eureka Lake and Miners' Ditch Company, and at the time of the commencement of this suit was so in possession as such successor.

"That during all the time said property has been held and possessed by this defendant, either alone or in copartnership with said defendant Powers, the net proceeds thereof have amounted to but little more than the interest accruing upon the principle of said mortgage debt.

"That the property and lands upon which the said several ditches in said complaint described are constructed and built, and also upon which the mining claims and mill-site in said complaint set forth are situated, are the public lands of the United States of America, the fee in the same never having been granted to any one or passed out of the said United States.

"That the said ditches, mining claims, mill-site and property in said complaint mentioned and described, being held by possessory title, the same passes by delivery of possession, and thus defendant is in possession of all of said ditches, mining claims, and property by successive delivery of possession from the said Miners' Ditch Company.

"That during the entire period of the transactions above set forth, from the date of the several meetings of the Miners' Ditch Company and of the Eureka Lake Company, in May, 1859, until the commencement of this action, the Miners' Ditch Company, and all and every one of the directors, members and stockholders, have had actual knowledge and notice of all, each and every one of the transactions hereinbefore set forth; that said directors, members and stockholders received the stock of the said Eureka Lake Water Company, and have acted as stockholders of such last named company at stockholders' meetings, and as such stockholders have had the benefit of the large sums of money advanced and loaned by this defendant and defendant Powers as aforesaid, and of the improvements and additions to the property as aforesaid; and during all that time neither the Miners' Ditch Company nor its directors, members or stockholders, or any or either of them, or any one of them, have ever objected to or made any question of the validity of any one of the transactions aforesaid; but, on the contrary, have always during all that time assented to and recognized the same and acquiesced therein, and during all of said time as aforesaid, they have each and

every one of them, well knowing that said Eureka Lake Water Company and its successors held and possessed said property, claiming title thereto, have recognized such title and acquiesced in the ownership and possession thereof.

"That the said Eureka Lake Water Company, and its successors, and those from and under whom they claim, have, ever since the month of May, 1859, been in possession of the ditches, mining claims and premises in said amended complaint mentioned and described, and of every part and parcel thereof, claiming title thereto, and have had the peacable, quiet, and undisturbed possession thereof, free and clear from any claim, right, or title by the said Miners' Ditch Company, or any of its directors, members or stockholders, or of any person, or persons whatever.

"And the defendant says that the said plaintiff, although now enjoying the full benefit of all the transactions aforesaid, and claiming the right to enjoy said benefit, now pretends and claims that all of said transactions, as hereinbefore set forth, are and were illegal and void, and passed no title, or any right of possession of, in, or to the property formerly belonging to said Miners' Ditch Company, either to said joint board or Eureka Lake and Miners' Ditch Company, or to the Eureka Lake Water Company, and seeks, by this action, to set aside the same, and to deprive the defendant, who has acted in good faith all throughout said transactions of his just, legal and equitable rights in the premises, and to oust him from the possession of all of said property; all of which said pretenses and claims this defendant charges are in bad faith, and against the solemn acts of the said plaintiff, long acquiesced in, and are contrary to equity and good conscience.

"Wherefore, this defendant prays that upon the full hearing of this cause, and upon a full consideration of the facts and premises, this Honorable Court will, by its order and decree, declare the various transactions hereinbefore in the tenth separate defense of this defendant set forth, valid and legal and binding upon the Miners' Ditch Company, and each and every one of its directors, members and stockholders. That by said order and decree the title of this defendant to all and every one the said ditches, mining claims and premises in said

amended complaint described, may be declared to be a good and valid title in law and equity, as against the said Miners' Ditch Company, and each and every one of its stockholders and members, and any persons claiming by, through, or under it. That by said order and decree it may be declared that the plaintiff has not any right, title, interest, or estate whatever in or to the said ditching, mining claims, and premises aforesaid, or any part thereof, and that all claims or pretenses of said plaintiff to the same, or to any part thereof, are wholly unjust, invalid and unfounded, either in law or equity; and that the plaintiff may be adjudged to be forever barred of and from all right, title, interest, claim, or estate in said premises, and every part thereof. That by said order and decree the said plaintiff may be ordered and adjudged to make, execute and deliver to this defendant such deed or deeds of conveyance or other instruments which shall to this court, on a full investigation and consideration of the case, appear necessary to perfect and quiet the said defendant's title to said ditches, mining claims and premises as against said plaintiff, and all persons claiming by, through, or under it.

"And this defendant prays for such other and further relief, decree or decrees, as to this Honorable Court shall seem meet and right in the premises, and as equity and good conscience shall require."

The issues raised by this equitable defense were first tried, and the court found the following facts:

"*First.* Plaintiff, the Miners' Ditch Company, is, and since a time prior to the year A. D., 1859, has been, a corporation duly organized and existing under the general incorporation laws of this State, its object being the building and maintaining water ditches and the sale of water in said Nevada county.

"*Second.* In May, 1859, the plaintiff owned and was in possession of all that portion of the premises mentioned in the complaint and described therein as the 'Miners' Ditch,' the 'Poorman's Ditch,' and the 'Grizzly Ditches.'

"*Third.* At the same time; viz., May, 1859, there was another corporation duly organized and existing, called the 'Eureka Lake Company,' which owned ditches and water

rights in said county, and in the immediate vicinity of those of plaintiff, both companies supplying the same markets.

"*Fourth.* The property and business of these two companies being similar, and a number of persons being members and stockholders in both, in the spring of 1859 the incorporators began to talk about a union of property and business of the two companies; and after considerable discussion it was finally agreed in the month of May, 1859, by both corporations; viz., the plaintiff and the Eureka Lake Company, that the property of the two corporations should be thrown together and managed in common, and should be owned in the proportion of two shares to the Miners' Ditch Company and three shares to the Eureka Lake Company. Certain improvements were to be made by each corporation on its own original property, and each was to pay its own debts then existing.

"*Fifth.* Under this agreement the two companies commenced acting together on the 29th of June, 1859. At that time all the property of both corporations was put into the possession of common agents of both, who had full control and management of the property and business down to the fall of 1860. Business was done in the name of the Eureka Lake *and* Miners' Ditch companies. During this time large amounts of money were expended in improving the common property, and the premises described in the complaint as the 'Extension of Poorman's Ditch,' 'Extension of Grizzly Ditch,' 'Gray Diggings, and 'Lewis' Ground,' were acquired.

"*Sixth.* This plan of conducting the business of the two companies, under the joint name of both, was only intended to be temporary; and during the year 1860, the members of the two corporations began to discuss the project of organizing a new corporation, to which the property of the old ones should be conveyed. To perfect this arrangement there was a meeting of the stockholders of the Eureka Lake Company, held, in pursuance of a notice duly published in a public newspaper of said county, on the 3d day of September, 1860, at which it was resolved that a new corporation, to be called the Eureka Lake *Water* Company, should be formed, and that the Eureka Lake Company would convey to it all its property, upon conditions that the Miners' Ditch Company

would do the same, and that stock of the new corporation would be credited to the stockholders of the two old companies in the proportions agreed upon. The trustees were authorized to make the conveyance. The new corporation was to be organized by the stockholders of the two old ones.

"*Seventh.* There was also a regular annual meeting of the stockholders of the Miners' Ditch Company, on the second Saturday of September, 1860, that being the time prescribed by the by-laws of the company for the regular meeting of the stockholders. The meeting adjourned for two weeks. At or about the time to which this meeting adjourned, there was a meeting of either the stockholders or the trustees, or both. The testimony does not show clearly the exact character of this meeting—that is, whether it was of the stockholders or of the trustees; but it is clear that there was a meeting of either one or the other, or both. At this meeting a resolution was passed authorizing the trustees to convey the property of the Miners' Ditch Company to the new corporation to be formed; viz., the Eureka Lake Water Company.

"*Eighth.* On or about the 29th of October, 1860, a deed bearing that date was executed by the trustees of the Miners' Ditch Company to the Eureka Lake Water Company, conveying all of the property of the former to the latter, including the property described in the complaint, except the Malakoff Ravine and the Eureka Lake saw-mill, which was acquired afterwards by the Eureka Lake Water Company. This deed purports upon its face to be the deed of the Miners' Ditch Company, *as a corporation*, has the corporate seal annexed, and is signed *as trustees*, and duly acknowledged by James B. Henry, Geo. C. Powers, James Cregan, Geo. Fellows and Robert McKerrow, who were at the time the trustees of the corporation. The deed was duly recorded in the recorder's office of said county (book nine, p. 189), on the 11th day of November, 1861, and is hereby made part of these findings.

"*Ninth.* About this time the members of the Eureka Lake Company were advised by counsel that its corporation had never been legally perfected, and that a valid deed could be made only by the members in their individual capacity; and such a deed was made on the 25th of October, 1860, by the

stockholders of the Eureka Lake Company to the Eureka Lake Water Company, which purported to convey all the property of the former to the latter. This deed was recorded November 11, 1861, in book nine of deeds, page one hundred and ninety-one, records of Nevada county.

"*Tenth.* On the 14th day of November, 1860, the Eureka Lake Water Company, having been duly organized as a corporation under the general laws of this State, took possession of all the property of the Miners' Ditch Company and the Eureka Lake Company, conveyed or attempted to be conveyed by the said two deeds, and from that time to January, 1863, had full possession and control of the same, claiming it as its own under said deeds, and no one interfering with or disputing its title or possession.

"*Eleventh.* Immediately after the organization of the Eureka Lake Water Company, stock-books were opened and stock was issued to the members of the two old companies in the proportions agreed.

"*Twelfth.* After the Eureka Lake Water Company took possession it expended large sums of money in improving the property and paying off liens thereon.

"*Thirteenth.* The Eureka Lake Water Company, in 1862, executed to the defendants, Zellerbach and Powers, a mortgage on all its property, including that described in the complaint, to secure the payment of the sum of two hundred thousand dollars. This was for money advanced and to be advanced; and the whole sum of two hundred thousand dollars was advanced before January, 1863. The mortgage provides that the defendants might receive and apply the profits and income of the property to the satisfaction of the mortgage debt; and the 3d of January, 1863, the Eureka Lake Water Company gave full possession and control of all the property to Zellerbach and Powers for that purpose. Zellerbach and Powers held full and uninterrupted possession under the arrangement until the 5th day of February, 1865, at which time they acquired all the right and title of the Eureka Lake Water Company to the property, by virtue of a sheriff's deed made on an execution sale under a judgment recovered against said company by one —— Martin. On the 5th of September, 1865,

the defendant Powers by deed conveyed to defendant Zellerbach all his interest (being one-half) in the premises. Down to September 5, 1865, Zellerbach and Powers, and from that time to the present Zellerbach alone, have been in continuous possession of all the premises, holding under and as successors to the Eureka Lake Water Company; and that said mortgage has not been paid, nor have the rents and profits of the property been sufficient to satisfy the same.

"*Fourteenth.* The Eureka Lake Water Company made large improvements on the property formerly held by the Miners' Ditch Company and described in the complaint, amounting in value to at least fifty thousand dollars.

"*Fifteenth.* It also paid mortgages on said property, which had been created by the Miners' Ditch Company, amounting to at least ninety thousand dollars.

"*Sixteenth.* It also expended other large sums of money in general improvements of and additions to the whole property acquired from the two old corporations, and paid off large liens and mortgages which had been created by the Eureka Lake Water Company on the property formerly owned by that corporation.

"*Seventeenth.* It does not appear affirmatively that the trustees of the Miners' Ditch Company, in corporate body assembled, formally authorized the execution of the deed to the Eureka Lake Water Company, or that it was executed at a formal meeting of the board of trustees. It was executed, however, by the three trustees, Henry, Powers and Cregan, at one and the same time, and while they were together and in the presence of each other. The other two trustees, Geo. Fellows and Robert McKerrow, signed it separately and at another time.

"*Eighteenth.* The by-laws of the corporation (the Miners' Ditch Company) do not contain any provisions about the meeting of the trustees, and it does not appear how they were called or held, or in what manner they usually transacted their business.

"*Nineteenth.* The certificate of incorporation of the Miners' Ditch Company contains the following statement of the objects or purposes of the company:

"'The object for which the said company is formed is to direct the waters running in the bed of the Middle Yuba, at or near a point one thousand six hundred yards above the forks, and by means of a canal or canals, to be constructed by said company, to carry said water along the ridge on the south side of said Middle Yuba and supply the miners of Snow Point, Orleans, Moore's and Wolsey's Flats, and other places along said ridge with water, and employ said water for mining, manufacturing and mechanical purposes.'

"*Twentieth.* From the date of the deed in October, 1860, the trustees of the Miners' Ditch Company did not meet again as a board until October, 1865, and during that time did not pretend to do any business or to set up any claim to or control of the property described in the complaint, and it had knowledge that the Eureka Lake Water Company, and afterwards Zellerbach and Powers, had possession of the property and claimed ownership of the same under the said deed from the Miners' Ditch Company.

"*Twenty-first.* All the premises described in the complaint, as well as the other property claimed by defendant, and also various other ditches owned by other companies, are situated on the ridge which divides the waters of the middle and south forks of the Yuba River; nearly all the stockholders of the Miners' Ditch Company lived on said ridge at the time of the transfer of the property to the Eureka Lake Water Company; the sale and transfer were public and notorious events; and I find that a majority of the stockholders had actual notice of the transaction and that all are chargeable with such notice. No objection was made to the asserted title of the Eureka Lake Water Company, or its possession, by the Miners' Ditch Company or by any of its trustees or agents, until the fall of 1865, a short time before this suit was commenced.

"*Twenty-second.* All the property described in the complaint is situated on the public domain of the United States, and is held by possessory title alone.

"*Twenty-third.* Counsel for plaintiff insists that I shall find categorically, as a fact, whether or not the property described in the deed of October, 1860, was essential to the business and existence of the Miners' Ditch Company. Complying

with this request, I find that it was *not*. I look upon this question, however, as scarcely one of pure fact, and I prefer finding the real facts upon the point. They are these: After the company had sold all its property, of course it could not have done any more business in the matter of mining or selling water without acquiring another water right and ditch, by purchase or by location and construction. It might have purchased other ditches and water rights in the same vicinity; it might, also, have located another water right in the same stream to which its original ditch was constructed, and might have built a new ditch. It could have thus obtained a supply of water in the wet season, but not in the dry season; and the project of building a new ditch would probably not have been profitable.

"[Quite a number of objections to the introduction of testimony were made during the progress of the trial, which, by consent, were taken under advisement, to be decided at the final determination of the case. The objections of plaintiff to the evidence offered to show that the union of the business of the two corporations was advantageous, are sustained. The other objections are overruled. I cannot at present remember each of them, but they all refer to mere preliminary matters; that is, to the so-called consolidation of 1859, and to other matters occurring before the deed of October, 1860; whereas, the real rights of the parties, as is stated in the 'opinion' hereto annexed, depend upon the said deed and the *subsequent* conduct of the parties.]

"From the foregoing facts I find, as a conclusion of law, that the Miners' Ditch Company has ratified, adopted, and made its own, the deed of October 29th, 1860, above referred to, purporting to convey its said property to the Eureka Lake Water Company, and cannot be heard to dispute it; and that defendant Zellerbach is entitled to the affirmative relief prayed for in his answer. Let judgment be rendered in accordance with his said prayer."

The following judgment was rendered:

"This cause came on regularly for trial, the parties hereto appearing by their respective counsel. A trial by jury having been expressly waived, the cause was tried by the court sitting

without a jury. Whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined; and the evidence being closed, the cause was submitted to the court for consideration and decision; and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

"Wherefore, by reason of the law and findings aforesaid, it is adjudged and decreed that the title of the defendant Marks Zellerbach to all and every of the ditches, mining claims and premises in the amended complaint in this action described, is a good and valid title in law and equity, as against the plaintiff, the Miners' Ditch Company, and all and every one of its stockholders and members, and any person or persons claiming by, through or under it.

"And it is further adjudged and decreed that the plaintiff, the Miners' Ditch Company, has not any right, title, interest or estate whatever in or to the said ditches, mining claims or premises, or any part thereof, and that all claims or pretenses of said plaintiff to the same are wholly unjust, invalid and unfounded, either in law or equity.

"It is further ordered, adjudged and decreed that the plaintiff, and all persons claiming under it, be forever barred of and from all right, title and interest, claim and estate in said premises, and every part thereof.

"And it is further ordered that said defendant Marks Zellerbach have and recover of and from said plaintiff his costs in this behalf expended, amounting to the sum of ——."

The plaintiff appealed.

The other facts are stated in the opinion of the court.

By the Court, Sawyer, C. J.: The Miners' Ditch Company, plaintiff in this action, has been, since 1859, a corporation under the laws of California, "its object being the building and maintaining of water ditches, and the sale of water in said Nevada county." In May, 1859, said corporation owned the property in controversy, consisting of the "Miners' Ditch," the "Poorman's Ditch," and the "Grizzly Ditches." At that time there was another similar corporation owning similar

property in the same vicinity called "The Eureka Lake Company," both supplying the same market. The property and business of the two corporations being similar, and a number of persons being members and stockholders in both, it was agreed in May, 1859, by both, that the property of the two corporations should be thrown together and managed in common, and should be owned in the proportion of two shares to the Miners' Ditch Company, and three to the Eureka Lake Company. Certain improvements were to be made by each corporation on its own original property, and each was to pay its own debts. The two corporations commenced acting together on the 29th of June, 1859. The property of both was, at that time, put into the hands of common agents who had the full management and control of the property and business down to the fall of 1860, the business being done under the name of the Eureka Lake and Miners' Ditch companies. During this time large amounts of money were expended in improving the common property, and other property of a similar character was acquired. This arrangement was only intended to be temporary. It was then proposed to form a new corporation, to be organized by the stockholders of the two old ones, to which the property of both old corporations should be conveyed.

At a meeting of the stockholders of the Eureka Lake Company, held on the 3d of September, 1860, it was resolved that a new corporation, to be called the "Eureka Lake Water Company," should be formed, and that the Eureka Lake Company should convey to it all its property on condition that the Miners' Ditch Company, the plaintiff in this case, should do the same, and that the stock of the new corporation should be credited to the stockholders of the two old corporations in the proportions agreed upon. On the second Saturday of September, 1860, there was a regular meeting of the stockholders of the Miners' Ditch Company, which was adjourned for two weeks. At or about the time appointed for the adjourned meeting there was a meeting of either stockholders or trustees, or both. The testimony does not show clearly the exact character of this meeting; that is, whether it was of the stockholders or trustees—but it is clear that there was a meeting of either

one or the other, or both. At this meeting there was a resolution passed authorizing the trustees to convey the property of the Miners' Ditch Company to the corporation to be formed; viz., "The Eureka Lake Water Company." On or about the 29th of October, 1860, a deed bearing that date was executed by the trustees of the Miners' Ditch Company to the Eureka Lake Water Company, conveying all the property of the former to the latter, including the property described in the complaint, except the Malakoff Ravine and Eureka Lake saw-mill, which were subsequently acquired. This deed purports upon its face to be a deed of the Miners' Ditch Company, as a corporation, has the corporate seal annexed and is signed as trustees and duly acknowledge by James B. Henry, Geo. C. Powers, James Cregan, George Fellows and Robert McKerrow, who were, at the time, the trustees of the corporation. The deed was duly recorded in the recorder's office of said county on the 11th of November, 1861.

The Eureka Lake Company having been advised that their incorporation had never been legally perfected, on the 25th of October, 1860, individually executed a deed, which was duly recorded, purporting to convey the property of said company to the "Eureka Lake Water Company." On the 14th of November, 1860, the Eureka Lake Water Company having been duly organized as a corporation under the laws of this State, took possession of the property of the Miners' Ditch Company and Eureka Lake Company, conveyed and attempted to be conveyed by said two deeds, and from that time to January, 1863, had full possession and control of the same, claiming it as its own under said deeds, and no one interfering with or disputing its title or possession. Immediately after the organization of the Eureka Lake Water Company, stock-books were opened and stock issued to the members of the two old corporations in the proportions agreed upon. After the Eureka Lake Water Company took possession it expended large sums of money in improving the property and in paying off liens thereon. In 1862 the Eureka Lake *Water* Company executed to defendants Zellerbach and Powers a mortgage on all its property, including that described in the complaint, to secure the payment of the sum of two hundred thousand dollars.

This was for money advanced and to be advanced, and the whole sum of two hundred thousand dollars was advanced before January, 1863. The mortgage provides that the defendant might receive and apply the profits and income of the property to the satisfaction of the mortgage debt; and on the 3d day of January, 1863, the Eureka Lake Water Company gave full possession and control of all the property to Zellerbach and Powers for that purpose. Zellerbach and Powers held full and uninterrupted possession under the arrangement until the 5th of February, 1865, at which time they acquired all the right of the Eureka Lake *Water* Company to the property by virtue of a sheriff's deed, made on an execution sale under judgment recovered against said company by one Martin. Powers conveyed his interest, being one-half, to defendant Zellerbach, in September 1865. Down to September, 1865, Zellerbach and Powers, and from that time Zellerbach alone, have been in continued possession, holding under and as successors to the "Eureka Lake Water Company." Said mortgage has not been paid, nor have the rents and profits been sufficient to satisfy it. The "Eureka Lake Water Company" made large improvements on the property held by the Miners' Ditch Company described in the complaint, amounting in value to at least fifty thousand dollars. It also paid mortgages on said property which had been created by the "Miners' Ditch Company," amounting to at least ninety thousand dollars. It does not appear affirmatively that the trustees of the "Miners' Ditch Company," in corporate body assembled, formally authorized the execution of the deed to the Eureka Lake Water Company, or that it was executed at a formal meeting of the board of trustees. It was executed, however, by the three trustees, Henry, Powers and Cregan, at one and the same time, and while they were together and in the presence of each other.

The other two trustees, George Fellows and Robert McKerrow, signed it separately and at another time. The by-laws of the Miners' Ditch Company do not contain any provisions about the meeting of the trustees, and it does not appear how they were called or held, or in what manner they usually transacted their business.

The certificate of incorporation of the Miner's Ditch Company contains the following statement of the objects and purposes of the company: "The object for which the said company is formed is to divert the waters running in the bed of the Middle Yuba, at or near a point one thousand six hundred yards above the Forks, and by means of a canal or canals, to be constructed by said company, to carry said water along the ridge of the south side of said Middle Yuba, and supply the miners of Snow Point, Orleans, Moore's and Wolsey's Flats, and other places along said ridge with water, and employ said water for mining, manufacturing and mechanical purposes."

From the date of the deed in October, 1860, the trustees of the Miners' Ditch Company did not meet again as a board until October, 1865, and during that time did not pretend to do any business or to set up any claim to or control of the property described in the complaint; and it had knowledge that the Eureka Lake Water Company, and afterwards Zellerbach and Powers had possession of the property, and claimed ownership of the same under the said deed from the Miners' Ditch Company. All the premises described in the complaint, as well as the other property claimed by the defendants, and also various other ditches owned by other companies, are situate on the ridge which divides the waters of Middle and South Forks of the Yuba River; nearly all the stockholders of the Miners' Ditch Company lived on said ridge at the time of the transfer of the property to the Eureka Lake Water Company; the sale and transfer were public and notorious events; a majority of the stockholders had actual notice of the transaction, and all are chargeable with such notice. No objection was made to the asserted title of the Eureka Lake Water Company, or its possession by the Miners' Ditch Company, or by any one of its trustees or agents, until the fall of 1865, a short time before the suit was commenced. All the property described in the complaint is situate on the public domain of the United States, and is held by possessory title alone.

The foregoing are the facts substantially as found by the court below. It also finds as a fact, that the property de-

scribed in the deed of October, 1860, was not essential to the business and existence of the Miners' Ditch Company, but adds: "I look upon the question, however, as scarcely one of pure fact, and prefer finding the real facts upon the point. They are these: After the company had sold all its property, of course it could not have done any more business in the matter of mining and selling water, without acquiring another water right and ditch, by purchase or by location and construction; it might have purchased other ditches and water rights in the same vicinity; it might, also, have located another water right in the same stream to which its original ditch was constructed, and might have built a new ditch. It would thus have obtained a supply of water in the wet season, but not in the dry season; and the project of building a new ditch would probably not have been profitable."

The general statute under which these several corporations were organized, provides that the certificate filed shall, among other things, state "the objects for which the company shall be formed" (Stats. 1859, p. 93, Sec. 2); that it shall have power "to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require" (Stats. 1853, p. 87, Sec. 4); and that "it shall not be lawful for the trustees to make any dividend except from the surplus profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock, unless in the manner prescribed in this act; and in case of any violation of the provisions of this section, the trustees, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, or were not present when the same did happen, shall, in their individual and private capacities, be jointly and severally liable to the corporation, and the creditors thereof, in the event of its dissolution, to the full amount so divided, withdrawn, paid out, or reduced; provided, that this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after the payment of all its debts,

upon the dissolution of the corporation or the expiration of its charter" (Stats. 1853, Sec. 13). The objects for which the Miners' Ditch Company was formed, as set forth in the certificate, have already been stated among the facts found by the court.

The first point made by the appellant is: "The consolidation of the Miners' Ditch Company and the Eureka Lake Company, by a mutual transfer and sale of their respective ditches and water rights to the Eureka Lake Water Company, in consideration of shares therein issued to the stockholders of the two former companies in proportions of two-fifths and three-fifths, was *ultra vires*, and, therefore, void."

In support of the point it is argued that the transfer of all the said property of the Miners' Ditch Company was not in pursuance of the "purposes of the corporation," but was, on the contrary, destructive of those purposes, and, therefore, not in pursuance of those powers conferred. If wrong in this view, that then the transfer of the property of the two old corporations to the Eureka Lake Water Company, in pursuance of the understanding had between the stockholders of the two old corporations, in payment therefor receiving certificates of stock and distributing the same among the several stockholders of the old corporations in the proportions agreed upon, was in substance withdrawing and dividing among the stockholders the capital stock of the old corporations, contrary to the provisions of the said thirteenth section.

In thus ingeniously grouping together in his point and argument several particulars, and constantly exhibiting them to the mind at one view, as a whole, counsel doubtless presents his case in its most plausible and formidable aspect. But, in this case, as in most others, in order to attain correct conclusions, it is necessary to consider separately every element that may affect the general result.

In considering the cases in which the law applicable to corporations is discussed, it must also always be borne in mind that there are several classes of rights to which they apply, and that upon the same general state of facts the legal consequences might be different with reference to the different classes of rights. Thus they are corporate rights—that is

to say, rights which pertain to corporations, *as such*—the artificial legal entity created by the act of incorporation, considered as a single, distinct person; individual rights of the stockholders, *as such*, and rights of the creditors of the corporation. The rights of strangers dealing with the corporation may vary according as they are considered with reference to the corporation itself, the stockholders or the creditors of the corporation. So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but of a *quasi* public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike and canal companies; and corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade and the development of the general resources of the country. They derive nothing from the government, except the right to be a corporation and to exercise the powers granted. In all other respects, to the extent of their powers, they stand upon the footing of natural persons, having such property as they may legally acquire, and holding and using it ultimately for the exclusive benefit of the stockholders. In this last class the stockholders and those dealing with the corporation are the only parties directly and immediately interested in their acts, so long as the corporation confines itself within the general scope of its powers. The rights of the corporation, the corporators, and of strangers dealing with the corporation, may, in some respects, vary according to the circumstances surrounding the transaction.

The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corpora-

tion is not authorized to perform it without their consent, or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. Cognate questions were very thoroughly and ably discussed by Mr. Justice COMSTOCK and Mr. Justice SELDEN, in *Bissell v. The Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y., 262, the latter dissenting from many views of the former, but both agreeing in the views just expressed with reference to acts *ultra vires* in the last sense mentioned. Mr. Justice COMSTOCK says: "Circumstances may, and often do exist, which may estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract—in other words, if, as I have shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party, who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is, also, *ultra*

vires, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto?* Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals."

Again: "That term (*ultra vires*) is of a very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations" (Id., p. 275). Mr. Justice SELDEN (whose views the appellant's counsel seems to approve) says, in the same case: "There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder because all persons dealing with a corporation are bound to take notice of its chartered powers."

The same principle is applicable to contracts not negotiable (22 N. Y., 289). Mr. Justice SELDEN also cited the following passage from the opinion of Lord St. LEONARDS: "The opinions of some of the judges in the Norwich case favor the disposition which I feel to restrain the doctrine of *ultra vires* to clear cases of excess of power with the knowledge of the other party, express or implied, from the nature of the corporation and of the contract entered into;" and adds: "To this I agree" (Id., 301). The consequence of the distinction we have taken in respect to contracts, *ultra vires* in the different senses indicated, is fully recognized by the English authori-

ties, as well as our own, and, as it is important, and the reasoning can be no better stated in any language we may select, we will make some extracts from the opinions in the English cases. In *Mayor of Norwich v. Norfolk Railway Company*, 30 E. L. & Eq., 128, Mr. Justice EARLE says: "The doctrine (relating to defense of *ultra vires*) was introduced at law by the East Anglian Railways Company's case, and the contract then in question being a contract by one railway company to pay the cost of another railway incurred in applying to Parliament, was judicially perceived from the terms of the contract itself to be necessarily unconnected with the purpose of the defendant's incorporation, and, therefore, prohibited. This is the point decided in the case. Looking at the report, with the remarks in the argument, I understand the court to have meant that any application of the funds and any contract which, in the knowledge of the party who should sue upon the contract, was intended for a purpose unconnected with the purpose of incorporation, was prohibited; and that, where the contract itself appeared to be necessarily unconnectd with the purpose of incorporation, both the parties must have known it to be so, and the court judicially perceive it to be void; and that, if the contract was not necessarily so unconnected, the ground of illegality must be averred and found in the usual way before it could be a ground of judgment; and that no application of the funds and no contract was prohibited by implication, which the parties intended to be connected with the purpose of incorporation, however distant the connection might be. The question put in the course of the argument, 'would a contract by a railway company for a theater or chapel be void?' exemplifies the doctrine.

"It would or would not, according as the purpose of the contracting parties was or was not connected with the railway. It might be a speculation separate from the railway and prohibited. Or, if works were wanted in a waste place, and the company found it for their interest to build a town and supply it with all the requisites for inhabitancy, and in order to secure a permanent supply of workmen of skill and responsibilty, added a chapel and a theater, with religious and secular instruction, it might be for the purpose of the railway and

valid; though distantly connected, the outlay might be found eventually to increase the profit from the traffic." Again: "The case of *McGregor v. The Dover and Deal Railway Company*, 17 Jur. 21, s. c. 16, E. L. & Eq., 180, shows that the question at law is whether the contract was prohibited, not whether it was made in excess of the authority given by the directors. There the contract of McGregor, that the railway company should pay costs, was held void, because such a payment by the company was prohibited by law. If a contract by the company for such a payment would have been merely an excess of authority, the contract of McGregor would have bound himself and would not have been absolutely void. The expression that the contracts, which are held null within the doctrine in question, are void because they are *ultra vires*, seems to imply that the courts of law, in an action against a corporation upon a contract duly made and valid in form, compare the contents of the contract with the powers supposed to be given to the directors by the shareholders, either in capacity of agents for them or by the statute, and hold it void if there is an excess beyond those supposed powers" (Id., 130, 131).

So the same justice recognizes the difference between cases where stockholders are suing in equity to restrain a misappropriation of the corporate funds and a suit on a contract against the corporation by a stranger. "In these suits in equity the members of the corporation, in their individual capacity, are considered to have rights *inter se* analogous to those of partners *inter se*, and the act incorporating the company is considered to be analogous to a partnership deed (see the judgment of Sir G. J. TURNER, L. J., in *Simpson v. Denison*, 10 Hare, 51; *Simpson v. Denison*, 13 E. L. & Eq., 359); and the question is, whether the misapplication is so unreasonable in kind and degree as to require the interference of the court for the protection of the complaining party. From these suits passages have been cited in which the judges have expressed opinions on the expediency of checking with much strictness the directors of incorporated companies having extensive powers and large capital, opinions which might be highly reasonable with reference to shareholders complaining of over-specu-

lation on the part of the directors at their cost; but they seem unreasonable and iniquitous if applied to the administration of the law in actions to which such corporations are parties. These suits in equity between different members of the company bear no analogy to actions at law by third persons against the corporation, either in respect to the parties to the suit or the subject in litigation. As to the parties in actions against corporations, the members thereof, in their undivided capacity, are strangers to the suit; and the rights of persons who contract with corporations are unaffected by the rights of members *inter se*" (Id., 130). Lord CAMPBELL, also, in the same case, says: "The mere circumstances of a covenant by directors in the name of the company being *ultra vires* as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under the seal of the company for the purchase of a large quantity of iron rails, and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purposes of the railroad it would be no defense to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known by the covenantee, and he being *in pari delicto*, I conceive that the maxim would apply, '*potior est conditio possidentis.*' This would be an illegal contract to misapply the funds of the company, and the illegality might be set up as a defense" (Id., 143, 144). There was no difference between the judges as to these principles although there was a disagreement as to whether by comparing the contract with the statute it appeared upon its face to be *ultra vires*. So, in the *Eastern Counties Railway Company v. Hawkes*, 35 E. L. & Eq., 9, which was a suit to compel the railway company to specifically per-

form a contract for the purchase of lands from Hawkes, the complainant in the court below.

The corporation, among other defenses, insisted that the contract was *ultra vires*. A specific performance was decreed by the Vice-Chancellor, which decree was affirmed by the Lord Chancellor, on appeal, and again by the House of Lords on appeal from his decree. In the House of Lords, Lord Chancellor CRANWORTH said: "A small portion only of it, about an acre and a half, is within the line of deviation, and it was agreed that a contract to purchase the whole (nearly six acres) was a contract *ultra vires*, inasmuch as the company could only purchase what was really necessary or proper for the construction of the line. But the answer to this argument appeared to me satisfactory. The contract was necessarily and on the face of it *ultra vires*. If the land in question was really wanted by the appellants for what are called extraordinary purposes, they are authorized to purchase it. Besides, the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole, if the plaintiff required them to do so; and it is a reasonable inference that the contract to purchase the whole was made, because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the the legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid as beyond their powers; for, as argued at the bar, it would be no answer to an action for iron rails bargained and sold that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of a future use, on a speculation that iron was likely to rise in value. I consider therefore, that this second objection is as untenable as the first" (35 E. L. & Eq., 19).

And Lord CAMPBELL said: "There can be no doubt that, as between the directors and the shareholders, it would have been *ultra vires* for the directors to put the seal of the company to

such a contract. They could not lawfully apply the funds of the company to the making of the line either under the act of the 10 or 11 Vict., c. 235, or any of their prior acts, and the respondent having full notice that they were exceeding their powers, and were guilty of a breach of trust, he could not have enforced the contract either at law or in equity. But upon the face of the contract itself there is no reference whatever to the 'direct diverging line.' The recitals of the operative part of the contract refer only to the main line between Wisbach and Spalding, and to the 'curvilinear line' of junction delineated upon the Parliamentary plan; nor is there any evidence to prove that the respondent was a party to the scheme alleged to have been formed by agents of the company to deceive Parliament by abandoning the curvilinear and substituting an unauthorized direct line of junction with the Ambegrate Railway" (Id., 22). And Lord ST. LEONARDS also said: "Under this head [that the contract was *ultra vires*] the general question of the power of such companies to bind themselves was argued. Now this is a question between the appellants, bound by their contract under seal, and the party with whom they contracted. It is not a question between them and their shareholders, but, as was observed in *Edwards v. The Grand Junction Railway Company*, 1 Myl. & Cr., 674, the court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself. The covenant of the company is binding on the face of it, and the appellants must show, if they can, why it should not be so. Here they were properly bound. The property was within the bill as brought in, and within the act as passed, and if the property in question had not been purchased before the act, it might have been bought after the act passed. It is no objection that the whole was not within the compulsory powers. The land clauses act provides that no party shall be required to sell a part only of any house if he is able and willing to sell and to convey the whole. And to that extent, of course, the appellants might properly agree to purchase the whole of the house, although they only require a part of it. And at all events other parts of the property, according to the plans, would have been required for the rail-

way, and the whole might have been required. I do not think that the contract can be avoided by the appellants showing that they do not require the whole. Where directors are acting in the obvious line of duty, as in this case, buying off an opposition, and acquiring property necessary or useful for the corporation, and the party contracting with such directors is not aware of any intended misapplication on their part, I am of opinion that the contract is binding, although it can afterwards be shown that the property really was not required for the railway. The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds" (Id., 31).

He further says: "My noble and learned friend showed that the mere circumstances of a covenant by directors in the name of the company being *ultra vires* as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it," and expressed a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and the contract entered into" (Id., 32.) From the cases cited it very clearly appears that the question as between stockholders and the corporation is a very different one from that which arises between the corporation itself and strangers dealing with it, and the principle established, when the contest arises between strangers and the corporation is, whether the act in question is one which the corporation is not authorized to perform under any circumstances, or one that may be performed by the corporation for some purposes, but may not for others. In the former case the defense of *ultra vires* is available to the corporation as against all persons, because they are bound to know from the law of its existence that it has no power to perform the act. But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test as between strangers having no knowledge of an unlawful purpose and the corporation is to compare the terms of the contract with the provisions of the law from which the cor-

poration derives its powers, and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced, otherwise it can. Or in the language of Mr. Justice SELDEN, in the case before cited, "where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed"(22 N. Y., 290). Strangers are presumed to know the law of the land, and they are bound, when dealing with the corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose. But they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duties, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose. And such is the presumption of the law, and upon this presumption strangers having no notice in fact of the unlawful purpose are entitled to rely. To this effect is the principle of the following, among other cases, as well as those already cited: *Commissioners of Knox County v. Aspinwall*, 21 How., U. S., 545, is a strong case applying this doctrine to public corporations; *Gelpecke v. City of Dubuque*, 1 Wallace, S. C. U.

S., 203, and cases cited; *Bank of United States v. Dandridge*, 13 Wheat., 69.

Upon any other principle there would have been no safety in dealing with corporations, and the business operations of these institutions would be greatly crippled, while the interests of the stockholders and the public, and their general usefulness, would be seriously impaired. The officers are appointed by the corporation, and if any loss results to strangers dealing with the corporation from their misrepresentations in matters within the general scope of their duties, it should fall upon the corporation, which is responsible for their appointment, rather than upon parties who have no other means of ascertaining the facts, and must rely upon their assurances or not deal with corporations at all.

The next step in the argument is to ascertain whether the Miners' Ditch Company had power to sell and convey its corporate property for any purpose; and upon this point we entertain no doubt. We have already seen by the fourth section of the act under which it was incorporated, that the corporation was empowered "to purchase, hold, sell and convey such real and personal estate as the purposes of the corporation shall require." The power to sell and convey is as broad as its power to purchase and hold, and is granted in the same terms. There is no complaint that the property was not properly acquired, and that the corporation legally owned it. The *jus disponendi* necessarily attached as an incident to the ownership. The very idea of private property, in which the public has no rights, involves the idea of a right to sell and convey, when the exigencies of the corporation require it. If the corporation could convey a part, it could convey the whole. The enterprise of the Miners' Ditch Company may have proved unprofitable, and rendered it necessary to dispose of its assets, and wind up the concern, as the only means of avoiding insolvency. It might be necessary to sell and convey a part, or the whole of its property, in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property, with these objects in view, would be a lawful purpose of the corporation. Although the object for which it was formed was to construct a ditch and

convey water for sale to miners, and for mechanical purposes, there was no obligation resting on the corporation to pursue this object after it became evident that the enterprise would be unprofitable and result in insolvency or loss. When such a result appears to be unavoidable, obviously the only mode by which the interests of the parties, and of the public, could be subserved, would be to dispose of its assets in the most advantageous way and pay off its debts, with a view to winding up the affairs of the corporation with the least possible loss. When a corporation of the kind in question is formed under our laws, no obligation to the public is assumed to carry on the business for which it was formed throughout the period specified in its certificate, whether the enterprise proves profitable or not. A corporation may forfeit it franchise by non-use; but a conveyance of property of the kind in question is not a transfer of its franchise.

The district judge in his opinion well says: "But the ditches and water rights were no part of the franchises; they were not given by the legislature. The whole property was situate on the public domain, and could be acquired only by appropriation, or purchase. The Miners' Ditch Company did not acquire any right to, or any property in the ditches, or water right, by virtue of its incorporation. After its charter had been perfected, and the legislative grant of its franchise had fully vested, it still had not a foot of ditch, or an inch of water. Its property had then to be acquired in the same way that a natural person, without any franchise, could have acquired it. The case is entirely different from that of a railroad company, where a right of way, and other special rights in the nature of property, are granted by the charter. The only special privilege which the Miners' Ditch Company received through its charter is simply the right to be a corporation, and thereby to do business in a manner different in some respects from that in which an ordinary association of natural persons may do business. A franchise was formerly said to be a branch of the royal prerogative, existing in the hands of a subject, and it may still be defined to be a special grant by the sovereign power of a peculiar privilege whereby the recipient may do or enjoy something which in the exer-

cise of the general rights of a subject or citizen he could not do or enjoy. But any citizen in the land might by virtue of his general personal right have acquired everything mentioned in the deed. The conveyance then was not of any franchise of the corporation. It is claimed, however, that as the deed conveyed all the property of the corporation, it was, in effect, a transfer of corporate powers, because it left nothing upon which the corporate powers could be exercised; in other words, that it destroyed the existence of the corporation. But the property sold was not essential to the existence to the corporation. The corporation was in full existence the moment its charter was perfected, although at that time it had not and could not have had a dollar's worth of property; and the books are full of cases where it is held that a corporation still exists after all its property is gone. The Miners' Ditch Company certainly did not die upon the transfer of all its property, as the bringing of this suit witnesseth; and I presume that a defense to a suit brought by a corporation, on the ground that it had no property, and was therefore dead, would find no countenance in a court."

This corporation was created for the immediate benefit of the stockholders, with no direct specific public purpose in view, as in the case of a railroad, or turnpike, or canal companies. The only interest the public has in the continuance of the business is the remote general interest which it has in the proper development of the resources of the country. The restrictions placed upon it are for the purpose of giving the public notice of its powers, of confining its business to the line indicated in its certificate, and for protecting the shareholders and parties dealing with it against the usurpation of its officers. The corporation is a distinct individual, holding the legal title to the property in trust for the benefit of the shareholders, who are the beneficaries having the equitable interest. If it is found from experience that the interest of the corporators and creditors requires that the business should not be carried on upon so large a scale, or that it should cease entirely, and the disposal and conveyance of a part or the whole of the property is necessary to a reduction or cessation of the business and the stockholders consent, or do not object,

we know of nothing in the statute, or in sound public policy, to prevent the sale or conveyance for such purpose. The State can have no interest in compelling its citizens or corporations to carry on business of any kind at a loss. No sound public policy can drive corporations or private individuals unwillingly to insolvency. The interests of business men and of the public must necessarily coincide; for the prosperity of the State is but the aggregate of the prosperity of the citizens. These views are supported by the authorities, and we know of nothing to the contrary. In *Treadwell v. Salisbury Manufacturing Co.*, 7 Gray, 393, where a stockholder filed a bill to restrain the sale of all the property of the company to a new corporation for stock to be distributed to the stockholders of the old, it was held that the directors of a manufacturing corporation as the best means of continuing the business, and pursuant to the votes of a majority of the stockholders, though against the protest of a minority, may sell the whole property of the corporation to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them.

The court say: "We entertain no doubt of the right of a corporation established solely for trading and manufacturing purposes, by a vote of a majority of its stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient to do so." After suggesting that there may be some limitation applicable to *quasi* public corporations, such as railway, canal, and turnpike companies, "to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public," which do not apply to purely private, commercial and manufacturing corporations, the court say, with reference to the latter: "Neither the public, nor the legislature, have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on business, for which they are incorporated, indefinitely and without any regard to the condition of their corporate property. Public policy does not require them to go on at a

loss. On the contrary, it would seem very clearly to be for the public welfare, as well as for the interests of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation short of the entire loss or destruction of its corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority. * * * Upon the facts found in the case before us, we see no reason to to doubt that the vote of the majority of the stockholders for the sale of the corporate property and the closing of the business of the corporation was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them" (7 Gray, 404, 405).

So, also, it was held that the whole property of the corporation might be sold to a new corporation, and the shares of the new corporation taken in payment, to be distributed among those of the old stockholders who were willing to take them. The court say: "Nor can we see anything in the proposed sale to a new corporation and the receipt of stock in payment, which makes the transaction illegal. It is not a sale by a trustee to himself for his own benefit, but it is a sale to another corporation for the benefit and assistance of the *cestui que trust*, the old stockholders. The new stock is taken in lieu of money, to be distributed among those stockholders who are willing to receive it, or to be converted into money by those who do not desire to retain it. Being done fairly, and not collusively, as a mode of payment for the property of the corporation, that transaction is not open to valid objection by a minority of the stockholders. (*Hodges v. New England Screw Co.*, 1 R. I., 347, 405, 406.)

So in *Sargent v. Webster*, 13 Met., 498, it was held that the

directors of an insolvent manufacturing corporation have authority to convey all the property of the corporation to one of its creditors, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation. Say the court: "Nor does it appear that the proceeding was not in furtherance of the purposes of the corporation. It was a trading corporation, and one of their purposes was to pay their debts, to enable them either to go on successfully again, by the aid of new assessments, or to wind up and settle upon terms most advantageous to the stockholders" (Id., 503, 504).

These are but examples of cases in which it may be in furtherance of the purposes of a corporation like the one in question, to convey a part or all of its property, and in making such conveyance for such purpose, the corporation would be acting within the general scope of its powers.

In the case now under consideration, it may be that a point had been reached whence it was impracticable to advantageously proceed in the original undertaking, and that the formation of a new corporation and conveyance to it of the property of two competing corporations, thus uniting all interests under one management, would subserve the interest of all concerned, and all the public. It appears that after the two old competing corporations had conveyed to the new one, the latter paid off large incumbrances before created by the former, so that the Miners' Ditch Company must have been largely in debt. After the conveyance, when all competition had ceased—and, it may be supposed, that the business with the monopoly of the water would be most profitable—the new corporation was compelled to borrow large sums of money, mortgage its property, and finally deliver possession to the mortgagee, after which the interest of said corporation was sold out by the sheriff. This shows that it is possible, if not probable, that the affairs of the "Miners' Ditch Company" had reached a condition in which the legitimate purposes of the corporation could only be subserved by a sale of its property for the payment of its debts. It shows at least that circumstances might exist which would require a sale for the lawful purposes of the corporation —circumstances under which the property of the corporation,

if not sold upon better terms by the corporation itself, might be sold *in invitum* at a loss, and the interests of both stockholders and creditors sacrificed by a forced sale under the hammer of the sheriff.

It is very clear to our minds that many circumstances might arise in view of which the lawful purposes of the corporation might require a sale and conveyance of a part, or of all the property of the Miners' Ditch Company. The power to sell, and the power to make a conveyance in pursuance of the sale, exists. Under many circumstances the question as to want of power in the given case cannot be determined by a mere comparison of the fact of a conveyance and the terms of the deed executed with the powers granted by the charter. If the conveyance of the corporate property in a given instance is *ultra vires*, in view of the purposes for which they are made, then the want of power "depends not merely upon the law under which the corporation acts, but upon extrinsic facts resting peculiarly within the knowledge of the corporate officers," and as we have seen, the invalidity of the sale is not available to the corporation in contests arising between the corporation itself and strangers dealing with it without knowledge in fact of the alleged purpose. The corporation has power to make a sale and power to execute a deed for a lawful purpose, and when the duly appointed officers assume to make a sale or conveyance, strangers dealing with it have a right to suppose the purpose lawful. So, if the corporation could convey at all, it could convey to any person, natural or artificial, capable of taking. The Miners' Ditch Company might, for a lawful purpose, have conveyed to the Eureka Lake Company, and if to the Eureka *Lake* Company, why not to the Eureka Lake *Water* Company? The latter was a legal corporation. There was nothing in the law to prevent the stockholders of either, or both, of the old corporations from incorporating themselves into one or a dozen other companies; and each new corporation formed would be a distinct and complete legal entity, having a separate and independent existence, with all the functions and powers conferred upon it by the law under which it came into existence.

There is nothing in *Abbott v. American Hard Rubber Co.*,

33 Barb., 580, or *Conro v. Port Henry Iron Co.*, 12 Barb., 64, and cases of that class, or any others that have been brought to our notice, in conflict with anything contained in the views here expressed. The former was an action by *stockholders* against the *directors* and corporation and others, who were *particeps criminis*, to set aside the transfer of all the property of the corporation made in fraud of the rights of the complainants (33 Barb., 594, 595). In view of the facts of that case the court properly says: "The experiment of the acting trustees in the two hard rubber companies has the merit of boldness as well as originality. Three of them marched out of the old company laden with spoils with which they enriched themselves as stockholders in the new, and it cannot be that their wronged and injured associates are remediless" (Id, 595). The discussion of the law must be considered with reference to the facts of the case. The latter was a case in equity between the creditors on one side and the corporation and other parties to the wrongful acts complained of, with knowledge of their illegality. The transfer affirmatively appeared not to be the act of the corporation. There was a breach of trust, and acts fraudulent as to creditors, and the proceedings to set aside the transfers were had by creditors in pursuance of express statutory provisions applicable to such cases (12 Barb., 62, 63, 64). A very cursory examination is sufficient to show that there is nothing in the case in conflict with the views expressed in this opinion.

The next point is, that the deed of October 20, 1860, from the Miners' Ditch Company to the Eureka Lake Water Company is void, because not authorized by the board of trustees acting as a board. In *Gashwiler v. Willis*, 33 Cal., 16, we held a conveyance executed by the trustees individually in pursuance of a resolution of the stockholders of a mining corporation, without any authority from the board of trustees acting as a board, and not having the corporate seal attached, to be void for the want of authority to execute it; and we find no reason to be dissatisfied with that decision. But in that case the party offering the deed made it affirmatively appear under what precise authority the act was performed, and there was no corporate seal affixed. The parties severally used their

private seals for the reason that there was no corporate seal, and in such cases we held that authority to execute the deed, and by implication at least to adopt a seal *pro hac vice* by the party assuming that power must be shown. The seal affixed must, of course, be shown to be the corporate seal. These facts were not shown, and the deed was held to be inadmissible till further proof should be made. We expressly reserved the question as to what the rule would be where the regularly adopted corporate seal is shown by competent proof to be affixed to the deed (Id., 19). This precise question is now presented. The instrument in question purports on its face to be an "indenture * * * between the Miners' Ditch Company, a corporation duly organized by law, * * * party of the first part," and the Eureka Lake Water Company of the second part. It concludes: "In witness whereof the said party of the first part hath hereunto set its hand and seal, the day and year first above written, by its trustees thereunto duly authorized." Signed by five parties, as trustees, with the corporation seal affixed. It is admitted in the replication, and found by the court, that the parties thus signing were, at the time of the signing the trustees, and that the seal affixed is the corporate seal, and that they signed the instrument and affixed the seal. Upon this state of facts appearing the deed was admissible in evidence, and, being in, was *prima facie* evidence of the regular and duly authorized execution of the deed. This point is settled by the decisions. Angel & Ames state the rule deduced from the authorities thus: "When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by the proper authority. The contrary must be shown by the objecting party." (Angel & Ames on Corp., Sec. 224.) The Supreme Court of the United States say: "This mortgage had the corporate seal attached, and the presumption was that it was there rightfully, and the court properly admitted it to be read in evidence." (*Koehler v. Black River Falls Iron Co.*, 2 Black., 717.) Mr. Chief Justice SHAW says: "In the first place the deed duly executed

by the corporate seal of the bank and produced by the party claiming under it, is *prima facie* a good title, and it is for those who wish to set it aside to impeach it." (*Burrill v. Bank of Nahant*, 2 Met., 166.) And Mr. Chancellor WALWORTH states the rule thus: "The seal of a corporation aggregate affixed to a deed is of itself *prima facie* evidence that it was so affixed by the authority of the corporation, especially if it is proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal (see 1 Kyd on Corp., and Angel & Ames on Corp., 115), and it lies with the party objecting to the due execution of the deed to show that the corporate seal was affixed to it surrepititiously or improperly; and that all preliminary steps to authorize the officer having the legal custody of the seal to affix it to the deed, had not been complied with." (*Lovett v. Steam Saw-mill Association*, 6 Paige, 60.) To the same effect are the following cases: *Leggett v. N. J. M. & B. Co.*, 1 Sax., Ch., 559; *Levering v. Mayor, etc.*, 7 Humph., 558; *White v. Thompson*, 1 Seld., 335; s c., 3 Sand., S. C., 428, and 3 Bosw., 285; *Jackson v. Campbell*, 5 Wend., 575; *Flint v. Clinton Company and Trustee*, 12 N. H., 433; *Hill v. Manchester and Salford W. W. Co.*, 5 B. & Ad., 874; *Clarke v. Imperial Gas-light Co.*, 4 B. & Ad., 326; *Berks & Daup. Tp. Co. v. Myers*, 6 Sergt. & R., 13, 15.

The rule must be as stated on principle, independent of authority. Any other would be subversive of the public interest, for no man could deal in safety with corporations, and all business transactions with these institutions would almost necessarily cease and the end of their creation fail of accomplishment. Confidence is a necessary element in all business transactions. If strangers cannot rely, at least *prima facie*, upon deeds of private corporations apparently regularly executed in pursuance of the powers conferred by their charters under the corporate seal, and attested by the signatures of the officers upon whom the control of their affairs is devolved by law, upon what may they rely? This is the most direct, formal and solemn assurance that can possibly be given by those authorized to give assurance. It is the legally appointed mode in which the corporation speaks to the external word, and

manifests its corporate will. Parties dealing with private corporations have no other reliable means of ascertaining the circumstances under which the act was done. The books, records and papers of such corporations are private property and not open to inspection by strangers. Many, if not in practice most, of the corporate acts are not made matters of record. Besides, it is as easy to make a false statement in some other mode—by a false record—as by a false deed. Whatever is done must be done through agents, and if their most formal and solemn assurances under the corporate seal are not reliable, then none of their acts can be depended on, and those dealing with corporations are absolutely without the means of self-protection. The rule established rests upon a foundation of solid sense. If this is not the rule, then, surely, there is too much truth in the saying that corporations are intangible, impersonal, irresponsible, soulless, artificial beings, endowed with a capacity to accumulate and enjoy property and exercise most of the functions and privileges pertaining to natural and material persons, but under no moral restraints and subject to few of the implications and responsibilities to which natural persons are liable, and the less men have to do with them the better it will be for them.

If it be conceded, then, that the corporation, in a contest with a party purchasing in good faith for a valuable consideration, relying upon the presumption arising upon the face of a deed apparently regularly executed under the corporate seal, and by the officers upon whom the law confers the corporate powers, may rebut the presumption (upon which point we now express no opinion), it is clear from the authorities cited that the burden of overthrowing the presumption in this case rested upon the corporation—the party denying the validity of the bond.

Upon the facts admitted and found then, notwithstanding the denial of authority by plaintiff *prima facie*, the presumption arises, and it affirmatively appears in favor of defendant Zellerbach, that the deed was executed by authority of the corporation. Aside from the presumption, although it is found that it did not affirmatively appear from the other evidence whether the authority was conferred at a meeting of the stock-

holders only, or at a meeting of the board of directors, or of both, still, since the burden of overthrowing the presumption is on the corporation, it is sufficient for defendant Zellerbach that the contrary does not affirmatively appear.

It is claimed, also, that the testimony does not justify the finding of the court to the effect that the exact character of the meeting in September, at which the trustees were authorized to convey the property of the Miners' Ditch Company, as whether a meeting of the stockholders or of the trustees, as a meeting of both, is not clearly shown, and inferentially therefrom the finding against the plaintiff on the issue, or to the authority of the trustees to execute the deed. We should not be justified in setting aside the finding on this point. The evidence is very loose, at best, and we should expect to find it so. It must be remembered that the business was very loosely done, and no minutes appear to have been preserved. The meeting was held several years before the date of the finding. For five years after that time there had been no other meeting of the directors. The grantee under the deed had been in the continued possession, expending large sums of money on the property conveyed under a claim of ownership. And neither the corporation, the trustees, nor the stockholders, from the date of the deed set up any claim, or suggested any doubt as to the validity of the conveyance. After so long silence on the part of those interested, under the circumstances of this case, there certainly should be required some very clear and conclusive testimony on the part of the plaintiff to justify the court below in finding affirmatively facts to overthrow the presumption raised by the law upon the other facts clearly established and found, and as to which finding the exception was taken. We think the finding of the court clearly justified. The burden of overthrowing the presumption raised by the deed rested on the plaintiff, and we do not think it was overthrown.

To recapitulate and apply the principles of law stated: Prior to the 29th of October, 1860, the Miners' Ditch Company, a corporation duly organized, was the owner, and in possession, of the property in suit. On that day a deed of conveyance was executed in the name and behalf, and purporting to be by the authority of the corporation by its trustees, and

under the corporate seal affixed by said trustees, by which said property is purported to have been conveyed to the Eureka Lake Water Company, another corporation duly organized and capable of receiving a conveyance of such property, and the possession was delivered to, and received by, said latter corporation. The last named corporation continued in possession of said property, claiming to be the owner under said conveyance, and from time to time made improvements on it to the amount of at least fifty thousand dollars, and paid off liens and mortgages created by the Miners' Ditch Company to the amount of at least ninety thousand dollars more. After the Eureka Lake Water Company had thus been in possession continuously, improving and claiming it as its own, for a period of some two years, in 1862 it mortgaged the property to the defendants Zellerbach and Powers, two strangers, to secure the sum of two hundred thousand dollars, advanced and to be advanced, and all of which was, in fact, advanced to said company, on the faith of its title, before January, 1863.

On the 3d of January, 1863, said company placed the property in the hands of the mortgagees, with authority to manage and apply the profits in satisfaction of the mortgage. Said defendants, under this agreement, continued so in possession till February 5, 1865, at which time they acquired the title of the Eureka Lake Water Company through a sale by the sheriff on a judgment in favor of one Martin against said company. Said mortgage had not been satisfied or paid by the rents or profits, or otherwise. No objection was made to said transfer to the Eureka Lake Water Company, or claim to said property set up by the Miners' Ditch Company, its trustees or stockholders from the date of the deed in 1860, till the fall of 1865, a short time before the commencement of this suit. The Miners' Ditch Company had power to sell the property, and to make such a deed as was made, for a proper purpose. Upon the face of the charter and the deed the power existed. A comparison of the deed with the charter disclosed no want of authority. If any existed, it arose from extrinsic facts, which vested in the knowledge of the corporation and its agents alone, and which strangers had no means of discovering. Under authorities cited, and upon principle, strangers dealing

with the corporation, in ignorance of any extrinsic facts affecting the question of authority, were entitled to rely upon the apparent power. The deed itself was executed under the corporate seal, signed by the officers appointed by law to control the affairs of the corporation, duly acknowledged and recorded. It carried upon its face, in the mode appointed by law, the most solemn assurance that the corporation or its officers were capable of giving, that the corporate assent had been given, and that everything had been done in pursuance of authority given by the board of trustees. The presumption, *prima facie* at least, that authority to execute the deed was given in such a manner as to render the deed a valid corporate act was thus raised, and this presumption was not overthrown by proof on the part of the corporation, upon which the burden of proof rested. Title, therefore, was affirmatively shown in defendant Zellerbach, and not overthrown by other evidence.

We need not inquire whether the conveyance could have been avoided by stockholders, or creditors, or the corporation itself, as between the Miners' Ditch Company and the Eureka Lake Water Company, on the ground that the latter was affected with notice of the illegal purpose, if any such there was, for which the Miners' Ditch Company made the conveyance, or whether there was in fact any illegal purpose, for the contest is not between those parties. The contest is between the Miners' Ditch Company and Zellerbach alone. Zellerbach, a stranger without notice—for none is found on his part—found the Eureka Lake Water Company in undisputed possession, expending vast amounts of money in improving and enlarging the works and paying off mortgages, claiming title under a deed regular on its face and apparently executed in pursuance of authority granted by charter. On the faith of these appearances he advanced two hundred thousand dollars, and subsequently took possession under an arrangement with the company, and finally purchased its interest under sheriff's sale, made at the instance of another creditor. He is, therefore, not affected by any knowledge of, or participation in, any wrongful acts of the Miners' Ditch Company on the part of the Eureka Lake Water Company. He is certainly in no

worse position than he would be if he had been a purchaser directly from the Miners' Ditch Company, without knowledge of any illegal purpose in the sale, or defect of authority in the execution of the deed. Zellerbach is in no way affected by any of those latent vices, not brought to his notice, if any there be, which affected the transaction between the two corporations.

This suit is not brought by a stockholder or a creditor. No person having an equitable interest has complained that the officers and trustees have exceeded their authority or violated the trust reposed in them to his injury. The corporation itself is plaintiff. After a five years' acquiescence, and long after the property has passed into the hands of innocent parties, who have advanced vast sums of money upon the faith of its apparent acts, paid off large liens, and greatly extended, improved and increased the value of the property, this corporation seeks to avoid its deed.

In the language of the court below, the plaintiff says: "True, the deed is apparently mine. I made it in the only way in which I could have made it, through my trustees and by my corporate seal; but in the internal and secret machinery of my existence the determination to make it was not regularly and properly arrived at. It is as though a natural person sought to avoid his deed by saying, 'True, my hand executed it, but my judgment dissented and my will forbade it.'"

Upon the facts found, we do not see how the result could have been otherwise, had the plaintiff been a stockholder or a creditor. But, however that may be, it is entirely clear to our minds that the District Court was right in finding and adjudging that the title of Marks Zellerbach to the property in controversy "is a good and valid title in law and equity as against the Miners' Ditch Company," the plaintiff in this action, and that the judgment should be affirmed.

Numerous authorities were cited in the arguments of counsel, which we have not particularly noticed for the reason that they do not appear opposed to the views we have expressed.

Rights growing out of corporate relations are presented under a great variety of circumstances, and discussed in various aspects, but the distinctions are obvious enough to those who

peruse the numerous decisions, and it would be unprofitable labor to comment upon and distinguish each particular case. Suffice it to say, that we find nothing in the general current of authorities cited opposed to the principles upon which this case is determined. We have said nothing to impugn the general doctrine so well established. The act of incorporation is an enabling act, and corporations can only exercise such powers as are expressly conferred upon them, together with such incidental powers as are necessary to a due exercise of those expressed, and that the powers must be exercised in the mode prescribed. Nor do we find it necessary to notice the distinction, if any there is, between common law and statutory corporations. It is presumed that no commercial, trading, manufacturing, and such like corporations, created since the Revolution in this country, exist, which do not derive their existence under some statute, and probably, too, such is the case in most similar modern corporations in England. Most of the decisions upon the subject must, therefore, relate to statutory corporations. Let the judgment be

AFFIRMED.

BY THE COURT, SAWYER, C. J., on petition for rehearing—Defendant Zellerbach is the only one interested in the property in dispute.

In rendering the decision in this case; we proceed upon the idea that he did not appear in the record to have any knowledge of the purpose of the Miners' Ditch Company in its conveyance to the Eureka Lake Water Company to distribute the stock of the latter company received as the consideration of the conveyance to the stockholders of the former, which is the fact in the case, if any there is, that renders the transaction between those corporations illegal. Our attention is now called to a fact not before brought to our notice by counsel, and overlooked when the opinion was written, that in the answer of Zellerbach stating the loan of money, through which the title was ultimately acquired by him, it is averred that the Eureka Lake Water Company "borrowed of this defendant and the defendant Powers (then partners in business under the firm of Marks & Co.) the sum," etc. It also appears in the findings

that one George C. Powers signed, as trustee, the conveyance of the Miners' Ditch Company to the Eureka Lake Water Company, and it is claimed that as this is the same as that of defendant Powers, it must be presumed that the Powers who signed the deed and who advanced the money as the partner of Zellerbach is the same person; that notice to one of the partners is notice to all, and that it therefore appears in the record that Zellerbach did have notice. Conceding this to be so, for the purpose of the decision, it becomes necessary to determine the point whether, upon that hypothesis, the Miners' Ditch Company stands in a position to avail itself of the illegality of its contract to distribute its capital stock to the stockholders of the corporation, by conveying its property and distributing the stock of another corporation received in payment, in the mode and under the circumstances stated in our former opinion, to its stockholders. And we are of opinion that it does not. The act of sale and conveyance was not wholly beyond the power of the corporation to perform. It had full power to sell and convey its property.

It is provided that it shall not be lawful for the trustees to divide or withdraw any portion of the capital stock. The corporation having power to sell and convey its property, but it being made *unlawful* for the trustees to divide the capital stock, the corporation stood upon the same footing in respect to such conveyance as any natural person with reference to a contract which he has the power to make, but which is made unlawful upon some principle of public policy adopted by the law-making power. In this case the contract was wholly executed. There was nothing of an executory character on either side. The conveyance was fully made by the Miners' Ditch Company to the Eureka Lake Water Company, and the grantee put completely in possession, and remained for years in such possession with the knowledge and acquiescence of both the corporation and stockholders. While so in possession it executed the mortgage to Zellerbach and Powers for the large sums of money advanced by them, and put them in possession, and this mortgage was subsequently foreclosed, and under the judgment of the court the property was sold and purchased in by them, and the defendant, having now acquired the entire

title, is in possession. Large portions of the money advanced went in satisfaction of debts due from the Miners' Ditch Company. At all events defendant was in possession under his conveyance, and the contracts were fully executed on both sides, each having received and enjoyed the consideration. There was nothing of an executory character left. It is not sought by either party in this action to recover on any branch of an executory contract—the usual form in which questions in such cases are presented. The question is which party, *in fact*, has the title as the case now stands, and, as between those parties, it is clearly the defendant. We know of no instance in which the grantor has been able to recover at law when the contract has been wholly executed, as in this case. *A fortiori*, he would not be entitled to relief in equity. But in the worst view that can be taken for the defendant the maxum applied in suits on illegal executory contracts, *in pari delicto potior est conditio possidentis, or defendentis*, would apply and justify an affirmance of the judgment. But the defendant is in a better position than if sued, on an executory contract. (See *Schemerhorn v. Salmon*, 14 N. Y., 141.) The contract is fully executed on both sides and the transaction closed between them. The case of *Inhabitants of Worcester v. Eaton*, 11 Mass., 368, is precisely in point. The only difference is, in that case the grantor in the illegal deed is a natural person and here it is a corporation. But with reference to the inherent power of the two persons to make a conveyance of the property conveyed, the parties stand on the same footing. The vice in both conveyances, if any there be, is that the contract is illegal for similar reasons. The principle is, therefore, the same. The consideration of the conveyance in the case cited was the composition of a felony. Yet the contract being fully executed it was held to pass the title and could not be avoided, so as to authorize a recovery by the grantor, or, which is the same thing, by the subsequent grantee of the grantor, and this, when an entry has been made for the very purpose of avoiding the deed. The case is in point and we know of none to the contrary; besides, we believe it to be sound.

The plaintiff, however, claims the benefit of the maxim,

because the defendant sets up the facts and prays affirmative relief. But we think the defendant and not the plaintiff is the party entitled to the benefit in this case. The defendant is in possession, and has been in possession for many years, with the acquiesence both of plaintiff and the stockholders, who have received and long enjoyed the consideration for the conveyance. The plaintiff brings the action to recover possession of the property conveyed. The defendants, to defeat a recovery, although it is unnecessary, set up the facts in their answer as a defense, and the court finds the facts in favor of the defendants, and holds upon the facts as stated and found, that the defendant has a title both in law and equity, and so adjudges. And this is undoubtedly so. The facts constitute a *legal*, as well as an equitable defense, and there is no necessity whatever for any equitable or affirmative relief. It was only necessary upon the facts alleged and found to enter a judgment that plaintiff take nothing by his action. This is not the exact form of the judgment, but it is substantially that, and is no more extensive in its operations as to the matters adjudged than it would be in that form. Technically, it might just as well be in that form, and as a plea of *res adjudicata* in another suit, it would cover the same issues. In effect, the relief is no more as it is than the ordinary judgment against plaintiff in an action for possession. In form, however, it adjudges the title to be in Zellerbach, and that, as between the parties, the plaintiff has no title. That is to say, the judgment simply adjudges what the present state of the title under the executed agreement as between the parties really is. It goes no farther. It grants no active relief. It gives nothing on any executory promise. It does not change the position of the parties. It only determines what that position is and leaves them in it. What before existed in fact and in law is simply adjudged to exist. It is now *res adjudicata* and not open to further dispute. And this the court would have determined as the basis of the judgment, although it would not have so expressed it in terms in the judgment, had the judgment been that the plaintiff take nothing by his action. But under the issues upon which such a judgment would have been entered, and the judgment in pursuance thereof, the

same matters would have been *res adjudicata*, as under the present form of the judgment. In substance, then, the parties are left in the same condition in which the suit found them as to their rights. We will look to the substance of the thing done, and not to the form, especially in a case like this, where it is clearly manifest that an outrageous injustice would be perpetrated upon the defendant, as between the parties to this action, if, under ordinary circumstances, they would be compelled to surrender this property to the plaintiff without a return of the vast sums of money they have advanced to obtain it, and in a case, also, where it is quite apparent that none of the parties to the original transaction in fact meditated any wrong. We have no idea that any of the parties at the time of the original conveyance supposed for a moment that they were preforming any illegal act.

REHEARING DENIED.

Mr. Justice SANDERSON did not express any opinion on the question of granting a rehearing.

NOTES.

The case of *Abbott v. The American Hard Rubber Co.*, 33 Barb. (N. Y.), 578, affords another illustration of the doctrine of *ultra vires* in its application in suits in equity. The facts in the case were these: In 1852 a corporation was organized in Connecticut, called the "Beacon Dam Company," with a capital of $25,000, composed of 1,000 shares of $25 each, with the apparent purpose of erecting and maintaining a water power on the Naugatuck River, in that State. "The American Hard Rubber Company" was subsequently established for the purpose of bringing into use the "hard rubber compound," to be manufactured under the patents of the Goodyears, in pursuance of several arrangements and agreements with them, and this association succeeded to the rights and franchises of the "Beacon Dam Company," and, changing its name to indicate the new purpose and objects of the company, and increasing its capital from $25,000 to $300,000, and adding largely to its real property and water privileges, it erected extensive manufactories for making a variety of articles out of the compound, using the water-power and machinery of the original corporation for this purpose. The management of the company from June, 1855, to February, 1860, was committed to seven directors, of whom the plaintiff and the defendants Judson, Ropes, Norton and Goodyear constituted five, one more than necessary

to constitute a quorum for the transaction of business. On the third of February, 1860, the four defendants last named met as trustees in New York; but it did not appear whether this meeting was regularly and legally called or not. The four trustees then resolved to sell all the personal property, tools, dies, machinery, fixtures and stock manufactured and unmanufactured to the firm of Pappenhusen & Konig, together with all the patent rights and privileges belonging to the corporation, and the benefit of all contracts made by the corporation, for the sum of $120,000, in monthly payments of $10,000; and on the ninth of the same month the sale to said firm was consummated. The resolution was passed and the sale consummated against the protest and remonstrance of the plaintiff, who was a stockholder in said corporation to the amount of $62,500 and a creditor to the amount of $12,000, and under liabilities for the company to a large amount. He was also a director, and had been from the commencement of the same, and had been largely instrumental in acquiring the property and franchises of the "Beacon Dam Company."

On the 13th day of February, 1860, the defendants, Pappenhusen & Konig, and Judson, Norton and Ropes, associated themselves together and became incorporated under the general laws of the State of New York, under the name of "The American Hard Rubber Company," for the manufacture of articles, compounds, goods and substances, composed in whole or in part of India rubber, etc.; the name being the same as the Connecticut corporation; and Pappenhusen & Konig immediately tranferred to the new corporation all the property and rights they had acquired from the old corporation.

The action was brought by the plaintiff on behalf of himself and all other stockholders of said company, for the purpose of setting aside said transfers as fraudulent and void, and the bill asked for an injunction to restrain the defendants from intermeddling with the property so transferred, and for the appointment of a receiver, etc.

The court held that the sale could not be permitted to stand; that the transfer was made without power in the directors so to do, and was a violation of the trust and confidence reposed in them; and that the plaintiff was entitled to a decree declaring the transfer to Poppenhusen & Konig fraudulent and void, and to an injunction to restrain the defendants from intermeddling with the property, and to a receiver to take possession thereof.

ALLEN, J., observes: "A bare statement of the case shows as conclusively as an elaborate argument could establish it, that the transfer was without power, and a violation of the trust and confidence reposed in the trustees and directors of the corporation.

"1. It was *ultra vires*. It would be strong evidence of fraudulent intent, under the circumstances, that a bare quorum of the body should undertake by their acts so seriously and radically to affect the future of the company, and the interests of the stockholders; but, waiving that question, and conceding that their acts stand as the acts of the whole board, I am of the opinion they were invalid for want of power. By the transfer, if allowed to stand, although the corporation still remained in form, with property which might be applied to some lawful purpose, the existence of the corporation was nominal, its substance was taken from it, and its property was valueless.

As a "Hard Rubber Company" it had no rights, no franchises, and no existence. Its very title was a misnomer and a false pretense. Its stockholders, who had invested largely for the manufacturing of the hard rubber compound, under patent rights transferred to, and vested in, the company, have, by their agents, been deprived of these valuable rights, and of all connection with the manufacturing of rubber; and it will hardly satisfy them or satisfy the law, to say that the name of the corporation is left to them, with a water-power and real property, which they can, if they so agree, apply to the making of shoe-pegs or calico, or any manufactured article other than that for which, and for which only, they associated together. It needs no expert to testify that machinery and fixtures adapted to the manufacture of hard rubber compound, cannot, to any great extent, be used for any other purpose. No matter how we may refine our argument, the fact is patent that the "American Hard Rubber Company" was effectually wound-up, and its affairs closed, as effectually as could have been done by a dissolution of the company by a legal process. In the event of a legal dissolution the associates could re-unite for some other purpose; so now, if this transfer stands, they can, if they can bring their minds together, engage in some other lawful business within the general powers defined in the articles of association. But to do this, all must agree. And can a board of trustees at their option thus compel their principals, the corporators, to change their business and their investments? I think not. Trustees cannot by their vote and their act, change the business of a corporation organized for making woolen or cotton goods into a manufactory of articles entirely different, although the business of the company may be named in the charter, in terms sufficiently general to include the substituted business. If the trustees in this case, chosen to carry on and prosecute the business of the company, could by a sale of the rights under which it was operating, disable the company from going on, as is here attempted, the same trustees could, without the assent of the stockholders, employ the corporate property in the wildest and most hopeless schemes. The immediate and necessary effect of the act was to terminate the business and thus practically and effectually destroy the corporation. This they could not do. It is certain that the officers could not directly, and without the assent of the great body of the society, dissolve it; and a majority of the stockholders could not do it against the dissent of the minority. *Smith v. Smith*, 3 Dev. S. C., Ch. R., 557; *Ward v. The Society of Attorneys*, 1 Collyer, 370.

"In the last case cited the attempt was made to surrender the charter with the view of obtaining a new charter for an object different from that for which the original charter had been granted; and a temporary injunction was granted. The attempt here is to do by indirection what was prohibited when attempted directly; for the answer here is: 'True we have disabled you from carrying out the original purpose of your association, but you may engage in any other business.' Boards of directors are agents of the corporation to manage its affairs, and carry out the purpose and object of its formation, and not to inflict upon it practical death. They are only authorized to do such things as are directly or impliedly directed or authorized by the charter. * * *

"2. The transfer was a violation of trust and an abuse of the power vested in the directors to manage the affairs of the company for the benefit of the corporators. * * * No principle is better settled than that a person having a duty to perform for others cannot act in the same matter for his own benefit. A trustee cannot directly or indirectly, by himself or through the agency of another, become the purchaser of the trust estate. Neither can he purchase an interest in property and hold it for his own benefit when, in respect to such property, he has a duty to perform inconsistent with the character of a purchaser on his own account. *Van Epps v. Van Epps*, 9 Paige, 237; *Hawley v. Cramer*, 4 Cow., 717; *Slade v. Van Vechten*, 11 Paige, 21; *De Caters v. Le Ray de Chaumont*, 3 Id., 178.

"It requires no authority to establish the fact that the direotors of the 'American Hard Rubber Company' could not have transferred the property of the corporation directly to themselves or to a corporation in which they were stockholders and directors. That is, they could not act as buyers and sellers in the same transaction, whether they acted in their individual capacity or as directors of two trading corporations. *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb., 468. This rule of restriction upon the powers of the trustee invalidates every indirect, as it does every direct, transfer to himself or for his benefit; and the intervention of a third person, as a medium or channel, by and through whom the title is transferred from the *cestui que trust*, and eventually vested in the trustee, will not uphold the transaction and sustain the title of the latter. Courts will look through the means to the end, and apply the proper remedy for the breach of trust." See, also, *Conro v. Port Henry Iron Co.*, 12 Barb., 64; *Ward v. The Sea Ins. Co.*, 7 Paige, 294; *The Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383. The charter is the fundamental law of the association—the constitution which prescribes limits not only to the directors, officers and agents of the company, but to the action of the body corporate itself, and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished, or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent. See, also, *Robbins v. Clay*, 33 Me., 132; *Kean v. Johnson*, 1 Stock. (9 N. J. Eq.), 401; *Bagshaw v. Eastern Union R. Co.*, 7 Hare, 114; *Bank of Commerce v. Bank of Brest*, Har., Ch. (Mich.), 101; Field on Corp., §§ 401, 402, 403; *New Orleans, Jackson & Gt. N. W. R. Co. v. Harris*, 27 Miss., 517.

In *Bagshaw v. Eastern Union R. Co.*, *supra*, it was held that where a company is authorized by act of Parliament to raise moneys for a specific purpose only, it is not competent for any majority of the shareholders of the company to divert such moneys to another purpose against the will of a single shareholder; and that even unanimity amongst the shareholders would not make such a diversion lawful.

But it is evident that none but the State or a creditor could complain under such circumstances. The State may always proceed to have the charter forfeited for misuse or abuse of corporate power (see *post*, Ch. VII), and a creditor, especially one interested in the fund to be misapplied, could undoubtedly claim protection and restrain the *ultra vires* act. *Ante*, Ch. V, and notes; *Coleman v. Eastern R. Co.*, *ante*, page 190, and notes, relating to in-

junction in such cases; *Salmons v. Laing*, 12 Beav., 339; *Mayor, etc., v. Groshan*, 30 Ind., 436; *Smith v. Bangs*, 15 Ills., 399; *Sears v. Hotchkiss*, 25 Conn., 171; *Illinois, etc., v. Cook*, 29 Ills., 237; *Brown v. Pacific Mail Steamship Co.*, 5 Blatch., 525.

And this remedy may be had, under certain circumstances, even where a remedy at law exists, for the fraudulent mismanagement of the directors. *Sears v. Hotchkiss*, 25 Conn., 171.

CHAPTER VII.

PROCEEDINGS FOR A FORFEITURE.

FIFTEENTH SELECTED CASE.

The Commonwealth v. The Commercial Bank.*

An information upon which a writ of *quo warranto* is founded is amendable either on or at any time before the trial. Therefore, objections to mere matter of form in the information, which may be removed by amendments, do not furnish a ground for quashing the writ.

The law of Pennsylvania in regard to the form of pleading in *quo warranto* remains as it was before the act of 1836. The Attorney-General may disclose in his information the specific ground of forfeiture, or he may merely set forth the franchises alleged to have been illegally exercised and call upon the defendant to show by what authority they are held.

The constant and willful violation by the bank of the fundamental conditions upon which the charter was granted entitles the Commonwealth to demand the forfeiture of its franchises. Abuses of this kind are of such magnitude and affect the public so injuriously, that, when willfully persisted in it becomes a duty of high obligation on the part of those in authority rigidly to enforce the forfeiture.

Where a bank is prohibited by its charter from making loans at a greater rate of discount than one-half of one per centum for thirty days, and from dealing in promissory notes, if it willfully violates these restrictions by discounting at higher rates than those allowed, or by dealing in promissory notes, otherwise than by discounting them at the rate prescribed, such acts constitute a good ground of forfeiture.

This was a motion to quash a writ of *quo warranto* issued out of this court at the relation of the Attorney-General against the Commercial Bank of Pennsylvania.

*Reported in 28 Pa. St., 383 (1857).

The information upon which the writ had issued charged that the bank had been incorporated by an act of Assembly passed 21st of March, 1814; that in and by said act it was expressly enacted and declared to be a fundamental article of said corporation that the rate of discount at which loans might be made by said corporation should not exceed one-half of one per centum for thirty days; that in and by said act it was also expressly enacted and declared to be a fundamental article of said corporation that the rate of discount at which loans might be made by said corporation should not exceed one-half of one per cent for thirty days; that in and by said act it was also expressly enacted and declared to be a fundamental article of said corporation that the said corporation should not deal or trade in anything but bills of exchange, gold or silver bullion, stocks of banks incorporated by the State of Pennsylvania, and United States treasury notes, or goods pledged to the said corporation for money lent and not redeemed in due time, or goods which might be the produce of their lands; that by an act passed 25th March, 1824, the charter of said bank was continued to the first Wednesday of May, 1835; and that by several subsequent acts; viz., 2d March, 1831, 26th April, 1849, and 2d April, 1849, the said charter had been further continued from time to time by the legislature, subject to all the provisions, restrictions and limitations contained in the original act of incorporation; that the said bank had repeatedly violated and broken the fundamental articles of their act of incorporation, and greatly perverted and abused their corporate powers in this: that for many months past the said bank had been in the constant practice of discounting promissory notes at exorbitant and usurious rates of interest far exceeding the rate of one-half of one per centum for thirty days; that the said bank received in the month of May, 1854, $2,115.50 for such usurious, unlawful and prohibited discount; in the month of June, $1,845.50; in July, $2,213; in August, $1,727.50; in September, $1,160; in October, $2,040; that between May and October the said bank received between seven and twelve thousand dollars, profits made exclusively from usurious discounts of promissory notes. That the said bank had also for a long time past; to-wit., from the 1st of May, 1854, been engaged in

dealing in promissory notes contrary to the express prohibition contained in the fundamental articles of incorporation. That the said bank, in committing the several unlawful acts aforesaid, have willfully abused its corporate powers, perverted the objects for which it was incorporated, usurped powers and functions which were expressly prohibited to them in their fundamental law, and by reason of said abuses, usurpations and unlawful acts, have forfeited the corporate rights and franchises conferred upon it by the several acts of Assembly aforesaid.

The defendants filed the following reasons in support of the motion to quash the writ of *quo warranto:*

1. Because the suggestion does not set forth with legal precision the facts upon which is founded the charge of the said supposed usury.

2. Because the suggestion is defective in this, that it sets forth legal conclusions instead of facts; that it sets forth instead of specific offenses against the charters vague and undefined generalities not capable of being met and answered.

3. Because the case set up is not a case of forfeiture under the law.

4. Because, if it were a case of forfeiture, the discretion of the court would induce them to forbear the imposition of so great a penalty upon the offense laid.

5. Because there is not to be found in the case anything to lead the court in the discretionary exercise of their authority over the writ to grant a rule. Upon the calling of the motion the counsel for the Commonwealth moved for leave to amend their information by adding twelve additional counts, which set forth the offenses charged in the original information in a variety of ways.

The opinion of the court was delivered by LEWIS, CH. J.

A writ of *quo warranto* having issued against the Commercial Bank, upon a suggestion filed by the Attorney-General, alleging that the bank had forfeited its charter by certain acts of misuser, the present motion was made to quash the writ. A number of reasons have been assigned in support of the motion, but they may be resolved into two. One goes to the

formal defects in the manner of setting forth the complaint; the other to the merits, and raises the question whether the acts complained of are sufficient to entitle the Commonwealth to demand a forfeiture of the charter. It is clear that if the Commonwealth has a right to amend the information, either on or at any time before trial, she cannot be put out of court and thus deprived of that right, by a summary motion to quash for mere defects of form in the suggestion. In England an information, even where the object is the punishment of a criminal offense, is not like an indictment, which is the finding of the grand jury and therefore cannot be altered in substance by amendments; but informations may be amended at any time before trial. 1 Str., 185; 2 Str., 871; 1 Salk., 371; 4 T. R., 610; 4 Burrow, 2147. For this reason they will not be quashed on motion of the defendant, except it appear that the court had no jurisdiction to try them. 1 Chit. Crim. Law, 689. If this be the rule in England, even in informations for criminal offenses, we see no reason why the right to amend should not be allowed with great liberality in this country, in cases designed solely for the determination of civil rights. Such is the character of the proceeding now before us. 1 S. & R., 382. We are of the opinion that the Commonwealth has the right to amend this case either on or at any time before the trial. It follows that objections to matters of form which may be removed by amendment, do not furnish a ground for quashing the writ. In connection with this branch of the case, it seems proper to bear in mind that the act of the 14th of June, 1836, does not require the suggestion to set forth the facts more fully than had theretofore been required in informations. In this respect it differs from the North Carolina statute of 1831, which requires the information to set forth the ground of forfeiture, and was designed to have the whole matter of accusation specified at once in the information. 6 Iredell, 461. The law of this State in regard to the form of pleading in cases of this kind, remains as it was before the act of 1836. The Attorney-General may disclose in his information the specific ground of forfeiture, or he may merely set forth the franchises alleged to have been illegally exercised and call upon the defendant to show by what

authority they are held. The plea should either deny the facts or set forth the authority. The replication may then allege the acts relied on as working a forfeiture. This may be denied or demurred to by the defendant. 3 Harge. St. T., 545; 2 T. R., 515; 10 Ohio Rep., 548; 6 Cow., 209. By the amendments offered, the Commonwealth proposes to adopt the latter course. If these amendments be allowed, all the grounds for the motion to quash are removed until the defendant, by plea, puts itself in a condition to require that the acts of forfeiture be set forth in the replication. But the record shows that it is intended to be urged as a ground of forfeiture that the defendant made loans at rates of discount exceeding one-half of one per cent for thirty days. This is set forth in the tenth count of the proposed amendments. In the seventh count of these amendments the defendant is charged with discounting promissory notes, and "receiving usurious, unlawful, and prohibited interest or discount" for so doing. In this count forty-seven distinct offenses of this character are charged upon forty-seven distinct occasions, giving the date of each transaction, and the amount of usurious interest received on each occasion. In the eleventh and twelfth counts of the proposed amendments, the defendant is charged with discounting bills of exchange at a greater rate of discount than one-half of one per cent for thirty days. In the original suggestion it is charged that the defendants *for many months past* have been in "the constant practice of discounting promissory notes at exorbitant and usurious rates of interest far exceeding the rate of one-half of one per cent for thirty days," and large sums of money are specified as having been received on such transactions during the several months particularly stated. It is further charged in the original suggestion that the defendant has been "for a long time past; to-wit., from the 1st of May, 1854, engaged in dealing in promissory notes contrary to the express prohibition contained in the fundamental articles of incorporation." It is further alleged that in these acts the said bank has "willfully abused its corporate powers and functions."

The first question which arises is, are these acts contrary to the defendant's charter? It must be remembered that a pri-

vate corporation can claim no powers except those expressly granted and such others as are necessary to the exercise of the powers thus granted. The act of 2d April, 1849, extended the charter previously granted to the Commercial Bank of Pennsylvania, subject to all general laws not altered or supplied by the act to extend the charter of the Farmers' and Mechanics' Bank, passed 16th March, 1849. That act does not alter or supply the 12th and 14th articles set forth in the original act of incorporation of 21st March, 1814, and repeated in the subsequent act of 25 March, 1824. The 12th article declares that "the rate of discount at which loans may be made" by the said corporation, "shall not exceed one-half of one per cent for thirty days." By the 14th article it is, among other matters, provided that the said bank shall not deal or trade in anything but bills of exchange, gold and silver bullion and other specified articles not material to the consideration of the present motion. The right to deal in bills of exchange is expressly recognized in the charter.

The bank may, therefore, purchase them in good faith at the current rates of exchange, although those rates may greatly exceed one-half of one per cent for thirty days. But if the purchase of a bill of exchange is a mere device to obtain a greater rate of interest than the bank is authorized by law to receive, it is as much a violation of the act of incorporation as a direct loan at the prohibited rate. If a bill be payable at the place where it is purchased, or at a place where it has the current rate of exchange in its favor, or if there is any understanding that it is not to be paid at the place designated, but to be renewed, it would be difficult to reconcile the charge of a premium for exchange above the prescribed rates of discount for loans with anything like good faith. So where a sum is charged notoriously above the current rates of exchange, the same difficulty would exist. No form can be given to a prohibited act which will make it valid, if the intention be to evade and violate the law. That intention should, however, be alleged in the pleading, when it is relied on as invalidating a transaction good in point of form; and the jury are to decide upon its existence as a matter of fact. It was declared by the Supreme Court of Ohio that "to allow a device of this nature

to defeat a statutory provision of law, and to sanctify usury by banks, would be equivalent in many cases to relieving them from all restraint." *Miami Exporting Company v. Clark*, 13 Ohio Rep., 16.

But it is not alleged in the suggestion that the bills of exchanged referred to were purchased with intent to evade the prohibition against making loans at a greater rate than that fixed by the charter. There is nothing, therefore, in the mere purchase of these bills, as stated in the suggestion proposed to be filed as an amendment, which we can declare to be contrary to the charter of the bank.

The right to make loans by discounting promissory notes at the rate prescribed is plainly deducible from the terms and objects of the act of incorporation; but the right otherwise to deal in promissory notes, or to make loans at a higher rate than that prescribed, does not exist. These acts are expressly prohibited in the fundamental articles. The question then arises, do these constant and willful violations of the fundamental conditions upon which the charter was granted entitle the Commonwealth to demand its forfeiture?

The question is not whether a single act, or even a series of acts of misuser, through inadvertence or mistake, may work a forfeiture; but whether the constant and willful violation of these important conditions of the grant produce that effect?

Mr. Justice STRONG, in delivering the judgment of the Supreme Court of the United States in *Mumma v. Potomac Company*, held that "a corporation, by the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for willful misuser or non-user." 8 Pet. Rep., 287.

Many years before that decision was pronounced, the same high principle was recognized by the same high authority, in *Truett et al. v. Taylor et al.*, 9 Cranch, 43, where the right of forfeiture for misuser or non-user was held to be "the common law of the land, and a tacit condition annexed to the condition of every corporation."

It is now well settled by numerous authorities that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incor-

porated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter, as for condition broken, or for a breach of trust. See Angel & Ames on Corporations, p. 660, and the cases there cited. In the *Attorney-General v. Petersburg and Roanoke Railroad Company*, 6 Iredell, 461, it was held that the omission of an express duty prescribed by charter is a cause of forfeiture, and that as implied powers are as much protected by law as those which are expressed, implied duties are equally obligatory with duties expressed, and their breach is visited by the same consequences. 6 Iredell, 461. It may be affirmed as a general principle that where there has been a misuser, or a non-user, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and willful they constitute a just ground of forfeiture.

The banks of this State have been clothed with the high and important privilege of creating a circulating medium by substituting their own promises to pay as currency in the place of gold and silver coin. This privilege is one of great profit, and is protected and enhanced in value by excluding the citizens at large from all participation in it. The main object in creating these monopolies was to enable them to furnish facilities to the business community by means of loans at the rates prescribed. So important was this object in the view of the legislature that, although the bank in question was located in the midst of a commercial population it was required by the original acts of incorporation that the farmers, mechanics and manufacturers, although not engaged in commercial pursuits, should be entitled to loans at six per cent to the amount of one-fifth of the capital paid in; and the State secured to herself a similar accommodation to the amount of one-tenth of the capital. If the banks were allowed to purchase promissory notes at a greater rate of discount than that allowed in the case of loans, the temptation to appropriate their resources to that business to the entire exclusion of loans at the specified rate would be irresistible. There is no reason to expect of them a voluntary devotion to the public interest to the neglect of that of the stockholders. It would, therefore, always happen that in times of financial stringency, when the community

most needed loans from them at moderate rates, their means would be employed in the more profitable business of purchasing paper at rates ruinous to their customers. Thus the main object of their creation would be defeated. To prevent this it was wisely provided in the charter of the bank before us that it should not deal in anything but the articles therein enumerated; and promissory notes are not among them.

The State had a right to impose these restrictions as a consideration for the profitable privileges withdrawn from the people and given to the banks. The people have, therefore, an undoubted interest in the proper application of the currency thus established by their authority. Their welfare absolutely requires that those intrusted with the high power of creating it shall appropriate it in good faith to the object for which it was designed. It is true we have an instance in a neighboring State of some banking institutions, incorporated with liberty "to make loans on such terms as the directors may deem expedient;" and under such a charter the courts were obliged to hold that they might make loans at any rate of interest agreed upon, without violating or forfeiting their charters. 10 Ohio Rep., 535; 14 Ohio Rep., 10. But the legislature of this State has not been guilty of any such indiscretion in regard to the institution before us. The charter fixes the rate of interest on loans, and expressly prohibits the taking of a higher rate. It also, as we have seen, prohibits the bank from dealing in promissory notes. We have no doubt that a violation of the charter in either of these particulars defeats the chief object of the grant, and is good ground for demanding judgment of forfeiture. These abuses are of much magnitude and affect the public so injuriously that when willfully persisted in it becomes a duty of high obligation on the part of those in authority to rigidly enforce the forfeiture.

These are the views at present entertained. We have been obliged to express them in order to dispose of this motion. But the question whether the acts complained of amount to a forfeiture of the charter will be open to further investigation in the final decision of the cause.

The motion to quash the writ of *quo warranto* is overruled.

THE RIGHT OF A CORPORATION CHARTERED IN ONE STATE TO HOLD REAL ESTATE IN ANOTHER.

SIXTEENTH SELECTED CASE.

The State v. Boston, Concord and Montreal Railroad Company.*

The right of aliens to hold real estate in this State, considered.

The right of the Supreme Court to issue the writ of *quo warranto*, is recognized in general terms by our statutes—the occasions are to be determined by common law rules. And, by those rules, it is apparent the writ is the appropriate mode in which to try any alleged usurpation of offices or franchises, inconsistent with the State sovereignty.

The right of a corporation chartered in another State, to hold lands in this State, discussed and granted.

This is an information, filed by the State's Attorney for the county of Orange, praying for a writ of *quo warranto* against the defendants, who are a railroad corporation just going into operation in the the State of New Hampshire. It is averred in the information that the defendants have, without authority from this State, erected a railroad bridge across the Connecticut River, and extending within this State, and that they have purchased and hold deeds of lands within this State, and that they occupy and use said bridge and land, claiming right to do so, and claiming to be owners in fee of the land; and the defendants are required to show by what warrant they "claim to take, hold, occupy, enjoy and exercise the premises and franchises aforesaid."

Testimony was taken, but as the facts fully appear in the opinion of the court, it is not deemed necessary to report the same.

The opinion of the court was delivered by Redfield, Ch. J.

This case has been argued, to some extent, upon both sides, upon the ground of an analogy, or supposed analogy between

*Reported in 25 Vt., 433 (1853).

the case of land owned by a foreign railroad corporation, and that of lands held by aliens.

I. As a preliminary proposition, we may safely assume, we think, that the escheating of the lands of aliens to the State sovereignty would be the very last remedy to which they would desire to resort, and that such a resort would only be made to avert some serious impending public calamity. Our titles are all allodial, in fact, if not in form, being a pure and absolute fee simple, and thus transferring an absolute title, which is impossible in England. The escheat of estates to the sovereign, in consequence of a conveyance to an alien, is a result of purely a feudal character.

It was so held because an alien, owing a foreign allegiance, was regarded as incapable of performing the feudal military services to the king, as lord paramount of all the land in the realm. Hence, the conveyance having carried the title out of the former proprietor, and the grantee being incapable of taking the estate, it was held to vest in the king, absolutely, at the death of the first grantee, as an alien could have no heirs to be invested with his bare possession, which was all the estate which ever existed in him, and which was always liable to be divested, at any moment, upon office found, as it was termed. Now none of these reasons exist in this country. There is no express prohibition in the constitution of this State against aliens holding real estate. But it has been supposed by some that there is such an implied prohibition contained in the thirty-ninth section, in these words: "Every person of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means, acquire, hold, and transfer lands," etc.

The most, then, which could be claimed in favor of the right to declare the lands of such as are, in the strictest sense, aliens, escheated to the State, is that such a general implied prohibition against aliens holding real estate, does exist in the State constitution. There is no provision in the constitution or the laws of the State for declaring the forfeiture or taking the escheat of such estates, and confessedly no such attempt has ever been made in the State, notwithstanding the acknowledged fact

that a large number of aliens constantly hold large quantities of land in the State. The most, then, which could be made out in behalf of such a proceeding, on the most favorable view, is, that it is *strictissmi juris*, a possible right of the sovereignty, but one which has always remained dormant, notwithstanding frequent occasions for its legitimate exercise.

II. In the next place, it seems to me that the right to interfere with aliens holding real estate in this country strictly and appropriately belongs to the national, and not to the State sovereignty. It goes upon the basis of some defect in allegiance; and allegiance is a matter pertaining altogether to the national sovereignty. They have the exclusive control of all relations between this country and foreign nations, or other citizens. And the States are expressly prohibited, in the United States Constitution, from attempting any stipulations, treaties or compacts, upon the subject. And the national government have already assumed to enter into stipulations with some European nations upon this particular subject. In the consular treaty, lately concluded between France and the United States, it is, by the 7th article, stipulated that in all the States of the Union, whose laws permit, Frenchmen shall enjoy the right of possessing personal and real estate, by the same title and in the same manner as citizens of the United States. And the President engages to recommend to such States as do not permit aliens to hold real estate, to pass such laws as may confer the right. This shows in what light the national sovereignty is disposed to regard this matter. Indeed, after proclaiming ourselves the asylum of the oppressed, and the home of the homeless and the destitute, it would have certainly an ugly sound to declare aliens incapable of acquiring and holding real estate in time of peace, they approving themselves peaceable and quiet dwellers upon our shores. Indeed, I conjecture it would be found, in fact, altogether impracticable to exercise any such power in these States, at the mere option of the State sovereignty, as is done in England, by what they denominate an inquest of office. That is the appropriate remedy for divesting aliens of real estate by way of escheat. It is a proceeding set on foot by the law officers of the crown, to try either the title or

right of possession, or the extent of the limits of land claimed by the crown. It seems originally to have been an *ex parte* proceeding, for the purpose of investing the king with the land, and then the subject was put to his petition, or *monstrans de droit*, as it was termed. But now, by statutes of 34 Ed. III, Chap. 14; 36 Ed. III, Chap. 13; and 2 & 3 Ed. VI, Chap. 8, it is provided that the claimant may traverse the inquest, and thus have the right determined at once by the jury. And as this proceeding is in the nature of a criminal procedure, and by consequence, in this State, the jury must be regarded as having, to some extent, the right to determine the applicability of such a common law proceeding to our situation and circumstances, it must, I think, be regarded as questionable how far any such procedure could ever be enforced, for the mere purpose of escheating to the State the lands of a quiet resident or non-resident alien, in time of profound peace, when no danger was apparent, imminent, or even remotely threatened.

III. Finally, it is not even suggested in argument that these corporations are absolute aliens, owing a natural foreign allegiance. And if they be, as is most probable, citizens of the United States, it would be a very remarkable proceeding to escheat their lands to the State, because they claim to hold the fee in the name of their corporation in the State of New Hampshire. It should certainly require a decided case of abuse of their legitimate powers to justify such a proceeding.

IV. But it seems to the court that this whole subject of the right of aliens to hold lands in this State has but a remote analogy to the usurpations which it is claimed this foreign corporation has perpetrated upon the sovereignty of the State. The right of this court to issue the writ of *quo warranto* is recognized in general terms by our statutes. The occasions are left to be determined by the common law rules; and, by those rules, it is apparent the writ is the appropriate mode in which to try any alleged usurpation of offices, or franchises, inconsistent with the State sovereignty. And that seems to be the purpose of this proceeding.

The allegations in the information are not that certain persons, without being incorporated, usurp and claim to exercise

corporate functions, which is no doubt good ground for filing such information; but, "that there is existing and doing business in the State of New Hampshire a corporation established, constituted and chartered by the laws of said State, by the name," etc., "and that said corporation, without any grant from this State, erected a railroad bridge across Connecticut River, extending its stone abutments into Newbury, in this State, about ten rods, and ever since have occupied and used the same and claim the right and franchise of so doing." It is further claimed and charged that this New Hampshire railroad has purchased in this State two pieces of land between the Connecticut River and the Passumpsic Railroad, and the fee of another piece, across which the Passumpsic have already laid their branch road to Connecticut River; and the gravamen of the charge seems to be, "That the Boston, Concord and Montreal Railroad claim to hold said land in fee simple, as the absolute owners thereof; which right of taking, holding, possessing and enjoying the said land and railroad bridge, is a usurpation upon the State of Vermont."

This case having gone to proof, it appears the Boston, Concord and Montreal Railroad, a corporation extending by its charter to the line of this State, at Wells River (and two Vermont railroads, by express statute of the State, having permission to unite with that road, or any other New Hampshire road at this point), have erected a railroad bridge across the Connecticut River, and purchased some fifteen acres of land adjoining the terminus of their road at the line of this State, which land will be convenient for the use of the company in doing business at the line of the State if they should not unite with any Vermont road, and almost indispensable if they do so unite. There is no evidence that this corporation have run their cars into this State, or that they propose to do so, unless they effect an arrangement for a junction with one or more of the Vermont roads; but there is every reason to believe they have no such purpose.

By their charter, it is admitted, this corporation have permission to hold real estate, for the accommodation of their business, greatly exceeding what they now hold. The question, then, is whether the corporation, having purchased and taken

a conveyance of this land, in this State, is to be regarded as any usurpation upon the sovereignty of the State? And it seems to us very obvious that they have committed no such usurpation, that they have assumed no franchises which are strictly of a prerogative character. By that I mean such acts as neither natural nor artifical persons can exercise without special grant of the legislature. All the functions of a corporation are, in one sense, franchises. The right to hold property in the corporate name, to sue and be sued in that capacity, to have and use a corporate seal, and by that to contract, and some others, perhaps, are franchises, which constitute the very definition of a corporation. And whenever and wherever the corporation is recognized, for any purpose, the existence and exercise of these franchises must also be recognized. But the right to build and run a railroad, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature. And we should not, of course, be expected to suffer a foreign railroad to usurp the exercise of any franchises of this character. This distinction exists in regard to some other classes of corporations. It is only the issuing of notes to be the representative of specie, and to form a portion of the currency, and the other local operations of banking—making discounts and receiving deposits and the like—which are of a prerogative character. But there are many other franchises of foreign banks, and other business corporations, of which it is of daily occurrence to allow the exercise, in every State in the Union. They are allowed to sue and collect their debts, to levy their executions upon lands, and take land in payment of debts, when mortgaged, or otherwise. And of all this no doubt is entertained. Mr. Justice McKinley was the only judge who ever had the boldness to hold the contrary, and his decision was speedily reversed by the Supreme Court.

This point is expressly decided in the State of New Hampshire, in the case of *Lumbard v. Aldrich* (8 N. H., 31), where it is held that "a corporation, created by the laws of another State, has power to take and hold lands in this State." Parker, J., says: "If they may sue, they may satisfy their judgment by levy upon lands; and, of course, hold the land and

convey it. And, if they can do this, they may take title by deed, in satisfaction of a debt, by agreement, or upon any other consideration." The same point is decided in *The Silver Lake Bank v. North* (4 Johns. Ch. R., 370), and in most of the American cases. Our own reports are filled with cases in favor of and against foreign corporations. *Day v. The Essex County Bank* (13 Vt., 97), *Grafton Bank v. Doe* (19 Id., 463), *Claremont Bank v. Wood* (10 Id., 582), *North Bank v. Wood* (10 Id., 194), occur to me, at the moment, and there are, doubtless, twenty other cases of the same kind.

All the chartered bridge companies across the Connecticut are, of course, incorporations, in most cases the charters having been granted by the legislature of New Hampshire; and it was shown to us, in the trial of this cause, that in very few instances has any grant been obtained from this State. But these bridges, like the railroad bridge in question, must rest at their western *termini* upon the soil of this State. And all this has been acquiesced in for fifty years or more. This will not indeed settle the rights of this railroad corporation by prescription, as their own existence is of a more recent date. But, it goes very far, in my apprehension, toward settling the law of the State in regard to road and bridge corporations in the States conterminus with this State; and, especially, where corporations have been created in this State with express permission to unite with this railroad, or any other New Hampshire road at this point, should I regard it as decisive of the right of the New Hampshire corporation to build their road to the very line of the State, if they should obtain the land for that purpose without coercive measures. They could not, perhaps, compel the land-owners to yield them the right of way, or even space to sustain the western abutment of their bridge, without a grant from the legislature of the perogative power to exercise the eminent right of domain over lands in this State.

But, having obtained the permission of the land-owners, I should not regard the bringing of their road to the very limits of this State, under the circumstances, as any infringement of the sovereignty of the State, or as any exercise of a prerogative franchise. It is the settled law of England, in regard to aliens

even, that if they purchase land by royal license, they may hold it. And in the present case we could scarcely regard the permission given the Vermont roads by their acts of incorporation, or acts amendatory of such acts, to unite with this or any other New Hampshire roads at the line of the State, at this point, as anything less than an implied permission to the New Hampshire roads to build their superstructure to the very line of the State. And as this line, at this point, is the "westermost bank of the Connecticut River," the bridge must, of course, in order to bring the rails to the line of the State rest more or less upon Vermont soil. Allowing them then, no prerogative right to eminent domain in the soil, we cannot regard the long practice of bridge companies across the Connecticut River, the actual license of the legislature, and the reason of the case, as justifying any interference with their quiet possession of the land, for the purpose of erecting a bridge by permission of the owners of the fee of the land, or by means of obtaining the fee in themselves.

The obtaining the fee of fifteen acres of land in the vicinity of the abutment of this bridge by the respondents would doubtless have been regarded as a very harmless operation by the State sovereignty, and would scarcely have attracted public notice had it not been for the rival interests of the Vermont railroads. And it was certainly not improper for them to arrest any exclusive claims which they might have, or might suppose they had, in any counter movements made by others. But if the Passumpsic Railroad should unite with the New Hampshire roads at this point (and as both roads are already in operation to this point, there is nothing to hinder such a union), and especially if the Montpelier Road should be ultimately built to this point, thus bringing two New Hampshire and two Vermont roads to a junction, it is not suggested that in such an event this land would not be useful for the accommodation of the probable prospective business of all these roads at this point. And as it seems probable that in the event of such a junction the erections to accommodate the business must probably be upon the Vermont side, to a considerably extent certainly, it is thus made highly desirable to secure this land, no doubt. And as the New Hampshire roads

have a common interest in the matter, we cannot comprehend why they should not have a common right to take early measures to secure the means of their joint accommodation. We certainly should not feel bound to interfere to hinder anything that they have thus far attempted.

We take it for granted, from what has been already said, that the respondents are, at present, regarded as holding most, if not all of this fifteen acres, certainly beyond what is indispensable to the accommodation of their legitimate business at the line of the State, as any other proprietor holds land in the State, subject to the public reserved right of eminent domain. And beyond the actual present necessities of the respondents, if the Vermont roads require any portion of the land held by the respondents for the necessary accommodation of their own business, they may still take an easement of this land for such purposes the same as if it were held by any other proprietor.

It is considered, therefore, that the prosecutor has shown no case requiring the exercise, by this court, of the writ of *quo warranto*, and the information is dismissed. And as the proceedings have been in the name of the State, no costs can be awarded.

NOTES.

The original writ of quo warranto.—It is observed by BLACKSTONE that "the judgment on a writ of *quo warranto* (being in the nature of a writ of right), is final and conclusive even against the crown. Which, together with the length of its process, probably, occasioned that disuse into which it has now fallen; and the introduction of a more modern method of prosecution by information, filed in the court of King's Bench by the Attorney-General, in the nature of a writ of *quo warranto*, wherein the process is speedier and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by fine for the usurpation of the franchise, as to oust him or seize it for the crown; but it hath long been applied to the mere civil right of seizing the franchise or ousting the wrongful possessor, the fine being only nominal." 3 Bl. Com., 263.

Writs in the nature of quo warranto.—The original writ is absolute in this country, the proceeding to try an alleged usurpation of an office by any person, or of franchises by a corporation, or abuse of franchises, being by information in the nature of a *quo warranto*, or some statutory

substitute, to which the general principles of the proceedings by *quo warranto* are applicable.

On this subject it was observed by SPENCER, J., in *The People v. Utica Ins. Co.*, 15 Johns., 386: "An information in the nature of a writ of *quo warranto* is a substitute for that ancient writ which has fallen into disuse; and the information which has superseded the old writ is defined to be a criminal method of prosecution, as well to punish the usurpation of the franchise as to oust him and seize it for the crown. It has for a long time been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only." See, also, *State v. Gleason*, 12 Fla., 190; *State v. Ashley*, 1 Ark., 279; s. c., Id., 513; *State v. Johnson*, 26 Ark., 281; *State v. Merry*, 3 Mo., 278; *State v. St. Louis Ins. Co.*, 8 Id., 330; *State v. Stone*, 25 Id., 555; *Commonwealth v. Burrell*, 7 Pa. St., 84; *Murphy v. Farmers' Bank*, 20 Id., 415; *State v. West Wis. R. Co.*, 34 Wis., 197.

It will be observed from these cases that the information is in form criminal, and that the proceeding is usually instituted by the public prosecutor in case of usurpations of office or franchises, or abuse or non-use of the latter by a duly constituted corporation.

Courts do not favor forfeiture.—It is not, however, every act of abuse or misuse of the franchises of a private corporation which will justify a judgment of forfeiture of the corporate franchises. In such cases it has been held that the act complained of must relate to the essence of the grant, and not merely consist of mistakes and unintentional errors; and the courts will act with great caution in declaring a forfeiture for these causes.

In the *State of Ohio v. The Commercial Bank*, 10 Ohio, 535, LANE, CH. J., observes: "Forfeitures of rights and privileges are not to be incurred, except under express limitation, or plain abuses of powers by which the corporation ceases to fulfill the design of its institution; and forfeitures are not to be favored when the legislature has provided other remedies adequate to correct the evils. The legislature in the charter of this bank, looking to this event, have provided such a remedy, believing that it was better to secure to the holders of its notes twelve per cent damages for a neglect to pay its debts, instead of the multiplied inconveniences and derangements involved in a liquidation and close of its business. Until, therefore, an entire derangement of the business of the company shall occur, there is no necessity for us to look out for causes of forfeiture, where the legislature plainly did not intend to exact it." See, also, *Commonwealth v. Commercial Bank*, *supra*; *People v. Kingstown & Middletown Turnpike Co.*, 23 Wend., 193; *People v. Bristol*, T. R., Id., 222; *Bank Commissioners v. Bank*, *etc.*, 6 Paige, 497; *Ward v. Sea Ins. Co.*, 7 Id., 294; *Pascall v. Whitsett*, 11 Ala., 472.

Instituted by public prosecutor or other agent provided by law.—In *Murphy v. Farmers' Bank*, 20 Pa. St., 415, it was held, that a writ of *quo warranto* will not be maintained to dissolve a banking corporation upon the suggestion of a mere private relator instead of the Attorney-General, or some authorized agent of the Commonwealth. WOODWARD, J., observes: "The principal reason assigned for the motion to quash this

writ of *quo warranto* is that the suggestion is at the instance of a private relator instead of the Attorney-General. The respondent is a corporation deriving its existence from the legislation enacted in the forms of the constitution, and the object of the relator is to put it out of existence—to declare its franchises forfeited to the Commonwealth. He is not a stockholder in the bank, is not a creditor, and claims no office or other private right in the corporation. Essentially, therefore, this is a public prosecution of the bank, though set on foot by an individual, and has for its object the recovery of a forfeited franchise, and not the redress of a private grievance. * * * Can one man so employ any department of the government as to tear down the fabric of a majority? Regarding the judiciary as one of the trustees of the sovereignty of the people, by which I mean the whole people, how can its functions be called into exercise against the existence of a public institution, except upon the suggestion of some agent of the whole people? If they may, if individual caprice, passion, prejudice, or interest may use the judicial arm of the government to overthrow what the legislative or executive arms have erected, the sovereignty of the majority is extinguished and the departments of the government, intended to work in harmony, are brought into fatal conflict. A house divided against itself cannot stand, and no more can a State. If *quo warranto* be given to individuals to dissolve corporations, power will cease to steal from the many to the few, for here will be a transfer of it bodily. With a corrupt judiciary, which the history of other countries teaches us is not an impossible supposition, acting as the instrument of private passions, any institution established by the immediate representatives of the people, and existing by will and consent of the people, and for their convenience and benefit, may be frustrated without appeal or recourse. These are general views which harmonize with the doctrine of the cases.

"And, therefore, whilst I recognize the rights of any relator to have a *quo warranto* in the Supreme Court, who is desirous to prosecute the same to redress any private grievance that falls within that remedy, I deny the right of any party, except the Attorney-General, or other officer of the Commonwealth, to sue for it to dissolve a corporation." See, also, *Commonwealth v. Farmers' Bank*, 2 Grant's Cas., 392; *Commonwealth v. Philadelphia, etc., R. Co.*, 20 Pa. St., 518; *Same v. Allegheny Bridge Co.*, Id., 185; *People v. Tibbits*, 4 Conn., 358; *King v. Ogden*, 10 B. & C., 240; *Gaylord v. Fort Wayne, etc., R. Co.*, 6 Biss., 286; *Commonwealth v. Arrison*, 15 S. & R., 127.

Acts destructive of objects of the corporation.—If a corporation does acts, or suffers them to be done, which are destructive of the objects of the corporation, or the purposes for which it was established, this is a ground of forfeiture. *State v. Real Estate Bank*, 5 Ark., 595; *People v. Bank of Hudson*, 6 Cow., 217.

In *State v. Real Estate Bank, supra*, the court say: "The grant of the State was made to the stockholders for a valuable consideration, and upon the implied condition that they would continue to exercise and perform the conditions imposed by the charter; and these had for its aim and end the promotion of the public good as well as the private interest of the corporators, and they entered into the consideration of the contract and formed

its obligatory force. Now, it is perfectly manifest upon principles of public policy, of reason and of natural justice, that a violation of this implied condition necessarily dissolves the consideration of the contract. The bank, by failing to perform her part of the agreement, has discharged the State from the continuance of the grant, and it not only becomes her right but her duty to resume it. Her faith and honor are pledged to protect the corporation in the peaceful enjoyment and full exercise of all its privileges and immunities, for they are supposed virtually to concern her social and political condition as a matter of convenience and general utility so long as the corporation has the will and possesses the power of discharging both her public and private engagements. This she unquestionably cannot do, if, by her own voluntary act and deed of assignment she has divested herself of all her corporate capacities; for if she be *civiliter mortuus* how can it be said that her legal personage still lives and that she has the power of perpetual succession? By such an act all her rights, privileges and liberties have passed from the control and management of the corporation; and, being stripped of all her power and authority she ceases to exist. In the language of the law she has abused her trust and perverted its object, and this works a forfeiture of her charter." See, also, *Slee v. Bloom*, 19 Johns., 456.

Judgment of ouster.—Where the proceeding is to procure a forfeiture of the charter, it should be against the corporation, and if a conviction is had for misuser or non-user, judgment of ouster and dissolution should be rendered; and this is equivalent to judgment of seizure at common law. *People v. Saratoga & Rensselaer R. Co.*, 15 Wend., 113; *Smith v. The State*, 21 Ark., 294; *State Bank v. The State*, 1 Blackf., 267, where it is observed by the court, that "there are but two grounds on which it can be contended that the corporate effects fall into the hands of the State: 1st, as a forfeiture for abusing the franchises; or, 2d, for the want of an owner by the dissolution of the corporation. When we examine the first of these grounds, we find nothing in the books to support an idea that the abuse of corporate franchises occasions a forfeiture of lands or goods, rights or credits, or, in fact, occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their charters were granted, was not that they should forfeit their property or possessions, if they abused their franchises; but only that they should forfeit the franchises. That which comes out of the hands of the king is the proper subject of forfeiture; the king, by the seizure, resuming what originally flowed from his bounty."

A court of equity has no jurisdiction.—A court of equity has no jurisdiction of an information, filed even by the Attorney-General of a State, against a private corporation, where the acts complained of are objected to solely on the ground that they are not authorized by the act of incorporation, and are, therefore, against public policy, if the acts are not shown to have injured or endangered any public or private right.

In *Attorney-General v. Tudor Ice Co.*, 104 Mass., 239, the court held, that, sitting in equity, it did not administer punishment or enforce forfeitures for transgressions of law; but that its jurisdiction was limited to the protec-

tion of civil rights, and to cases in which full and adequate relief could not be had on the common law side of the court or of the other courts of the Commonwealth; that the Tudor Ice Company was a private trading corporation, and not in any sense a trustee for public purposes; that it was not a suit by a stockholder or creditor, nor the acts complained of shown to have injured or endangered any rights of the public or any individual or other corporation; and could not, upon any legal construction, be held to constitute a nuisance; and that no case was made upon which, according to the principles of equity jurisprudence and the practice of the court, an injunction should be issued upon an information in chancery.

In *Attorney-General v. Utica Insurance Co.*, 2 Johns., Ch., 371, Chancellor KENT, in a very able and elaborate opinion, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by informa- in the nature of a *quo warranto;* and no appeal appears to have been taken from his decision. An information in the nature of *quo warranto* was thereupon filed, and sustained in the Supreme Court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.*, 15 Johns., 358: *Goddard v. Smithett*, 3 Gray, 116, 122, 123; *Attorney-General v. Salem*, 103 Mass., 138; *Boston & Providence Railroad Co. v. Midland Railroad Co.*, 1 Gray, 340.

Exception in case of a public nuisance.—Informations in equity have, however, been sustained, where a public nuisance is sought to be restrained and immediate action is required. *District Attorney v. Lynn & Boston R. Co.*, 16 Gray, 242; *Attorney-General v. Cambridge*, Id., 247; *Attorney-General v. Boston Wharf Co.*, 12 Gray, 553; *Rowe v. The Granite Bridge Co.*, 21 Pick., 244.

CHAPTER VIII.

ULTRA VIRES CONTRACTS—RIGHT TO RECOVER THE CONSIDERATION.

SEVENTEENTH SELECTED CASE.

WHITE v. FRANKLIN BANK.*

Where, upon the deposit of money in a bank, the depositor receiving a book containing the cashier's certificate thereof, in which it was stated that the money was to remain in deposit for a certain time, it was *held* that such agreement was illegal and void, under Revised Statute, c. 36, § 57, as being a *contract by the bank for the payment of money at a future day certain;* and that no action could be maintained by the depositor against the bank upon such express contract; but that he might recover back the money in an action commenced before the expiration of the time for which it was to remain in deposit, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract; and that such action might be maintained without a previous demand.

BY an agreed statement of facts it appeared that on the 10th of February, 1837, the plaintiff deposited with the defendants the sum of $2,000, and received from them a book containing the following words and figures; to-wit.,

"Dr. Franklin Bank in account with B. F. White, Cr. 1837, Feb. 10th. To cash deposited, $2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, cashier."

It further appeared that on the 7th of July, 1837, the plaintiff brought this action against the bank to recover the money so deposited by him, declaring on the money counts, and on an account stated.

*Reported in 39 Mass. (22 Pick.), 181 (1839).

If the court should be of opinion that the action could be maintained, the defendants were to be defaulted and judgment rendered for the sum of $2,000, with interest; otherwise the plaintiff was to become nonsuit.

WILDE, J., delivered the opinion of the court. The first ground of the defense is that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise this action would be maintained. But it is very clear that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of the Revised Statute, c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the Commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This, therefore, was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well settled principle of law. It was fully discussed and considered in the case of *Wheeler v. Russell*, 17 Mass. R., 281; and the late Chief Justice, in delivering the opinion of the court, remarked: "that no principle of law is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." The same principle is laid down in *Springfield Bank v. Merrick*, 14 Mass. R., 322; and in *Russell v. De Grand*, 15 Mass. R., 39. In *Belding v. Pitkin*, 2 Caine's R., 149, THOMPSON, J., said: "It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by English authorities. In *Shiffner v. Gordon*, 12 East, 304, Lord ELLENBOROUGH laid it down as a settled

rule, "that when a contract which is illegal remains to be executed, the court will not assist either party, in an action to recover the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *particeps criminis*, no action can be maintained to recover it back. The rule of law is so laid down by Lord KENYON, in *Howson v. Hancock*, 8 T. R., 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualification and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting.

"When money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by an action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books; namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the preformance of an engagement prohibited by law, clearly such an action can in no case be maintained; but when the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover." 2 Com. on Contr., 109.

The rule, with these qualifications and distinctions, is well

supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The first ground on which the plaintiff's counsel rely in answer to the defendants' objection is, that there was no illegality in making the deposit, and that the illegality of the transaction is confined to the promise of the bank, and the security given for the repayment, that alone being prohibited by the statute.

The leading case on this point is that of *Robinson v. Bland*, 2 Burr., 1077. That was an action on a bill of exchange given for money lent and for money won at play. By the *St. 9 Anne, C.* 14, it was enacted that all notes, bills, bonds, judgments, mortgages or other securities for money won or lent at play, should be utterly void. The court held that the plaintiff was not entitled to recover on the bill of exchange, but that he might recover on the money counts for the money lent, although it was lent at the same time and place that the other money, for which the bill was given, was won. The same principle was laid down in the cases of *Utica Ins. Co. v. Scott*, 19 Johns. R., 1; *Utica Ins. Co. v. Caldwell*, 3 Wendell, 296; and *Utica Ins. Co. v. Bloodgood*, 4 Wendell, 652. In these cases the decisions were, that although the notes were illegal and void as securities, yet that the money lent for which the notes were given might be recovered back. The principle of law established by these decisions is applicable to the present case. The only doubt arises from the meaning of the word "contract" in the prohibitory statute. But taking that word in connection with the other words of prohibition, we think it equivalent to the promise of the bank; and that the intention of the legislature was to prohibit the making or issuing of any security in any form whatever for the payment of money at any future day.

The next answer to the objections of the defendants is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not *in pari delicto*. It is not universally true that a party who pays money as the consideration of an illegal contract cannot recover it back.

Where the parties are not *in pari delicto*, the rule *potior est conditio defendentis* is not applicable.

In *Lacaussade v. White*, 7 T. R., 535, the court say, "that it was more consonant to the principles of sound policy and justice that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than by denying the remedy to give effect to the illegal contract."

This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties, or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may be entertained respecting it in former times.

In the case of *Smith v. Bromley*, 2 Dougl., 696, note, it was decided that the plaintiff was entitled to recover in an action for money had and received for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord MANSFIELD laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general law of public policy, then the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole court, in the case of *Jones v. Barkley*, 2 Doug., 684.

On this distinction it has ever since been held that where usurious interest has been paid the excess above the legal interest may be recovered back by the borrower in an action for money

had and received. So money paid to a lottery office-keeper as a premium for an illegal insurance is recoverable back in an action for money had and received. *Jaques v. Golightly*, 2 W. Bl., 1073. But in *Browning v. Morris*, Cowper, 790, it was decided that where a lottery office-keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by the *St. 17 Geo.* 3, c. 346, he cannot recover it back, though the premium of insurance paid by the insuer to the lottery office-keeper might be. The distinction on which this case was decided is very material in the present case. Lord MANSFIELD referred to the determination in *Jaques v. Golightly*, where it was said "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And, he adds, "it is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office-keeper. The man who makes the contract is liable to no penalty. So in usury there is no penalty upon the party who is imposed upon." The same distinction is noticed and enforced by Lord ELLENBOROUGH in *Williams v. Hedley*, 8 East, 378. In that case it was decided that where money was paid to a plaintiff to compromise a *qui tam* action for usury it might be recovered back in an action for money had and received; because the prohibition and penalties of the *St.* 18 *Eliz.*, c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, etc." It was argued for the defendant in that case "that as the act of the defendant cooperated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so far illegal on the part of the defendant himself as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not, therefore, to be considered as strictly *in pari delicto* with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis*, and in that respect not entitled to recover from his co delinquent money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled and Lord EL-

LENBOROUGH fully approved the doctrine laid down by Lord MANSFIELD in *Smith v. Bromley*, and the decisions in the several cases in which that doctrine had been confirmed. The same distinction has been recognized in other cases and was adopted by this court in *Worcester v. Eaton*, 11 Mass. R., 376, in which PARKER, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts, and being founded in sound principle, is worthy of adoption as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank and not against any person dealing with the bank. In the words of Lord MANSFIELD, "the statute itself, by the distinction it makes, has marked the criminal."

The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in *Walker v. Chapman*, Lofft, 342, where money had been paid in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held that he should recover, because the contract continued executory. This case was cited with approbation by BULLER, J., in *Lowry v. Bourdieu*, 2 Dougl., 470, and the distinction between con-

tracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were *in pari delicto*. The case of *Tappenden v. Randall*, 2 Bos. & Pul., 467, was decided on that distinction. HEATH, J., said, "it seems to me that the distinction adopted by Mr. Justice BULLER between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R., 405; 1 H. Bl., 67; 7 T. R., 535; 3 Taunt., 277; 4 Taunt., 290.

In the case of *Aubert v. Walsh*, 3 Taunt., 277, the authorities were considered, and the law was definitively settled as above stated; and it does not appear that it has ever since been doubted. In *Utica Ins. Co. v. Kip*, 8 Cowen, 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by defendants' counsel that the contract in question was executory within the true intent and meaning of these decisions and the doctrine now laid down.

This question has not been much discussed, and it is not necessary to decide it in the present case, the court being clearly of opinion that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion; which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is whether the plaintiff was bound to make a demand on the bank before he commenced his action.

The general rule is that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, then there can be no good reason given why the bank should be excepted from the operation of the general rule.

In *Clark v. Moody*, 17 Mass. R., 145, it was held that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without demand.

If the defendants had sold to plaintiff a post note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money without any previous demand; and there seems to be no substantial distinction between such a case and the one in question.

JUDGMENT ON DEFAULT.

NOTES.

Consideration held recoverable in analogous cases.—The general right to recover the consideration of a void contract has been maintained in many analogous cases, and even where the contract was prohibited by positive statutory enactment.

Thus, in the case of *The Oneida Bank v. The Ontario Bank*, 21 N. Y., 490, where a post-dated draft was issued by a bank to one Perry, payable without time, it was held to be contrary to the provisions of the statute of the State of New York against issuing bills or notes payable otherwise than on demand. But the court further held that, assuming such draft to be void, the party who had taken it upon a loan of money to the bank, was entitled to recover the money so loaned to it, either upon the ground of the contract of loan, treating that as valid and rejecting the illegal security, or upon the disaffirmance of the contract, as for money had and received.

There would be a higher reason for permitting a recovery of the consideration of a contract void as *ultra vires*. In the latter case, there may be no

positive prohibition of the contract, but only a want of power to contract. It may be neither *mala prohibita*, in a strict sense, nor *mala in se;* while in the above case, the act was prohibited by the statute.

Chief Justice COMSTOCK, in the foregoing case, observes: "I proceed, therefore, next to observe that a party dealing with one of those banks, and taking from it a security which the statute prohibits, can reject the security if it be regarded as void, and recover the money or value which he advanced on receiving it. The general principles involved in this proposition have been more than once carefully considered in this court, and I think the very point has been fully determined. *Tracy v. Talmadge*, 14 N. Y., 162; *Curtis v. Leavitt*, 15 Id., 9; *Sackett's Harbor Bank v. Codd*, 18 Id., 240. The argument for the defendant against this position rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. Assuming these instruments to have been issued contrary to law, and that they are void, then if we also consider that both the parties to these dealings were offenders, and equally so, the consequence would probably follow that Perry, if he were now the plaintiff, not only could not recover on the drafts, but could not maintain his suit for the money lent. But such were not the relations of both the parties to these transactions. Whatever there was of guilt in the issuing of the drafts, it was the creature of the statute.

"There is no rule of ethics or principle of the common law, against the issue of time obligations by banks and bankers. The offense is, therefore, precisely of the nature, form and porportions which the legislature have declared. By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced solely against the individual banker, or the officers, agents and members of the association. The same power which created the offense has designated the criminal parties. This designation is made by the very terms in which the prohibition is clothed and the punishment prescribed. The statute is wholly incapable of a construction which would sustain an indictment against a customer or dealer who should receive from a banker a post note for his money, his property, or his services; and yet, without such a construction, there can be no pretense for saying that he is in any sense a public offender. We are of opinion that the case, in this respect, is undistinguishable from those referred to, and we consequently come to the conclusion that if the issuing of the draft was prohibited, and if they were also void, Perry, nevertheless, had a right to demand and recover the sums of money which he actually loaned to the defendant. The loans themselves were lawful contracts, and I see no reason why they cannot stand according to their terms and intention, rejecting only the assurances given for the payment of the money as simply worthless."

As to the general right to recover the consideration in case of *ultra vires*, and, therefore, void, contracts, see *Dill v. Wareham*, 7 Met. (Mass.), 438; *Ex parte Bignold*, 22 Bev., 143; *Troup's Case*, 29 Id., 353; *Hoar's Case*, 30 Id., 225.

Recovery of the consideration allowed to relieve the hardships of the doctrine.—It is manifest that the doctrine that the consid-

eration advanced on an *ultra vires* contract may be recovered, was adopted to prevent the injustice resulting from the application of the doctrine of *ultra vires* to corporate contracts. It, however, presents this strange anomaly; namely, that although no recovery can be had upon an *ultra vires* contract, for the reason that the stockholders and the public may thereby be prejudiced, and the corporation be unable to perform its duties to them, yet, a recovery may be had of the property or other consideration advanced, not upon the express contract made, but upon a *quantum meruit*, for work and labor done, or for money had and received, or, in an action for the specific property delivered thereon.

If this is permitted, does it protect the stockholder, or creditor, or the State? We have formerly observed on this subject: "Whether the recovery is in the one form or the other might vary somewhat the amount of the recovery, and enable either party to take advantage of the other. By this means, one may lose the advantage of his good bargain under the contract; and if the contract is void either party may avail himself of it. But will that protect the State, or subserve the interests of the public, or secure the appropriation of the funds to the legitimate purposes for which it was created, or tend to secure a faithful discharge of corporate duties? If the corporation must restore money, or property received under such void contract, should it not be required to pay a reasonable compensation for labor and services received in executing *ultra vires* acts. For instance, if a corporation by its charter is authorized to construct and operate a railroad from A to B, and it not only constructs and operates such road, but also constructs and operates a lateral road to C, and becomes indebted to D for labor and services, under a special contract to construct it, but to whose claim for the same on the express contract the corporation successfully interposes the plea of *ultra vires*, should he not be permitted to recover on a *quantum meruit*? If so, what distinction is there in principle so far as the doctrine of *ultra vires* is concerned, except as to the mere form of the recovery? In either case the *ultra vires* act is done. It cannot be expected that the form of the action or the amount of the recovery can affect the State or the public; but it may greatly prejudice one of the parties to the contract, and affords a bounty to dishonesty and corruption." Am. Law Rev., 1879, p. 647, Art., *Ultra Vires*.

In such a case either party may interpose the plea of *ultra vires* in an action upon the contract. The right should be mutual. If the contractor should discover that he had made a bad contract in the case stated, he might refuse to fulfill it. If he has a good contract the corporation could interpose the plea to an action upon it for the price, and he could only recover, if at all, the reasonable value of the work done. These unfortunate results from an attempt to relieve from the injustice of the application of the doctrine naturally suggests the question, whether, after all, the doctrine is well founded, and whether in its application to executed or partially executed contracts, it is productive of more benefit than injury? But we have had occasion to notice many recent and respectable authorities, maintaining a right to recover in such cases upon the contract itself. *Ante*, Ch. II, and notes.

CHAPTER IX.

THE DOCTRINE IN ITS APPLICATION TO MUNICIPAL CORPORATIONS, IN CASE OF EXECUTED CONTRACTS.

EIGHTEENTH SELECTED CASE.

ARGENTI v. CITY OF SAN FRANCISCO.*

POWER OF CITY TO OPEN AND IMPROVE STREETS.—The charter of the city of San Francisco, of 1851, gave the city power to open streets and alleys and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section two, article five, of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property-holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury to be used as the city sees fit.—COPE, J.

POWER OF CITY TO CONTRACT DEBTS.—The provision in section five, article three of the charter of 1851, as to not creating liabilities beyond $50,000, over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts. *Id.*

IDEM—LEGAL EFFECT OF PROVISION IN CHARTER.—The legal effect of this provision is entirely different from the clause in the eighth article of our constitution prohibiting the legislature from creating debts against the State. *Id.*

VALIDITY OF CONTRACT OF CORPORATION.—As to the contracts of corporations the rule is, that where the question is one of capacity or authority to contract arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the contract cannot, in an action founded upon it, contest its validity. And this rule applies with equal force to all corporations, public or private. *Id.*

*Reported in 16 Cal., 255 (1860).

IDEM.—Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons and depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner, and to the same extent as the latter. *Id.*

IDEM—CASES CITED.—Cases as to the liability of municipal corporations on contracts, express or implied, just as individuals are liable, cited and commented on. *Id.* Cases opposed, cited and commented on. *Id.* The general doctrine that corporations possess only the powers specifically granted, and such as are necessary to carry into effect the powers so granted admitted. *Id.* *Seale v. City of San Francisco* (July term, 1858); *Phelan v. City of San Francisco* (6 Cal., 531); *Lucas, Turner & Co. v. City of San Francisco* (7 Cal., 463); *Holland v. City of San Francisco* (7 Cal., 361), commented on. *Id.*

IDEM—LIABILITY OF CORPORATIONS ON THEIR CONTRACTS.—As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out by the charter. But even a want of authority is not in all cases a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract made without authority cannot be enforced, but where the contract has been executed, and the corporation has received the benefit of it the law interposes an estoppel and will not permit the validity of the contract to be questioned. *Id.*

CONTRACT FOR CITY IMPROVEMENTS VALID.—Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city and when completed were approved of and received by him on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: *Held*, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their preformance, it would be a fraud on plaintiff to permit her now to repudiate them. *Id.*

WARRANTS TO BE PAID OUT OF A PARTICULAR FUND.—The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the

improvements so made under said contracts: *Held*, that plaintiff cannot recover on the warrants; that being payable out of a particular fund they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund, and no other. *Id.*

WARRANTS MUST SPECIFY CERTAIN FACTS.—Nor can plaintiff recover on some of the warrants so drawn for the further reason that they do not specify the appropriations under which they were issued, nor the date of the ordinances made in the same as is required by the eighth section of the third article of the city charter; and they would not constitute any authority to the treasurer to pay them, even if there were funds in the treasury specifically appropriated for their payment.—FIELD, C. J. *Seale v. The City of San Francisco* (July term, 1858) never became authority, because, a rehearing having been granted, the opinion first delivered not having been adhered to after the first reargument fails. *Id.*

PROPOSALS FOR STREET WORK, HOW CONVERTED INTO CONTRACTS.—The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property-holders adjacent * * the proposals to be opened and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper in the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards of commissioners, and the work awarded to B. Subsequently, an instrument was executed by B, as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B's proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B began the work, and afterwards transferred his contract and interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed by the city's engineer, who duly certified to the accounts for the same, which accounts were duty audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand assessments had been duly levied by the city upon the property adjacent to the improvements to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city as liable either on the express contract or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received for defendant to his use: *Held*, that, as under the charter the city had authority to order the improvements in question, the acceptance of the

proposals of B by the street commissioner and the committees of the two boards, converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. *Id.*

CITY PRIMARILY LIABLE FOR STREET WORK.—*Held*, further, that the city is primarily liable; that she, and not the contractor, must look to the property-holders adjacent to the improvements for the necessary expenses; that the property-holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property-holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment. *Id.*

IDEM.—In this case, the city having discharged the assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted as the agent of the plaintiff in collecting the assessments. *Id.*

IDEM—LIABILITY, HOW CREATED.—The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon implied contracts, has no application to cases of this character. *Id.*

IDEM.—The doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of the express contract, imposes upon the city the obligation to do justice with respect to the same. *Id.*

OBLIGATION OF CITY.—If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice, which binds all persons whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *Id.*

PROMISE IMPLIED BY LAW.—In these cases the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the charter. *Id.*

LIABILITY OF CITY, HOW FIXED.—To fix the liability of the city in respect to money or property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her, or be under her control. *Id.*

ACCEPTANCE OF SERVICE BY CITY, HOW EVIDENCED.—In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the subsequent obligation to pay for them, cannot be asserted in any other way. If not originally authorized no liability can attach upon any ground of implied contract. *Id.*

LOCAL IMPROVEMENTS.—The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor, he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property-holders, and only indirectly to the city at large. *Id.*

LIABILITY OF CITY IN GENERAL.—As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money or other property which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Id.*

IDEM—EXCEPTIONS.—Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter, as, for instance, upon the issuance of bills of credit. *Id.*

Appeal from Fourth District.

THE facts appear in the opinion rendered. Plaintiff had judgment for the full amount of the warrants. Defendant appeals.

COPE, J., delivered the following opinion, FIELD, C. J., concurring in the judgment only.

This is an action to recover a sum of money alleged to be due the plaintiff for grading and planking certain streets within the corporate limits of the city of San Francisco. The plaintiff relies for a recovery:

First. Upon an implied contract for work, labor and materials.

Second. Upon certain express contracts, under which the work and labor were performed and the materials furnished.

Third. Upon various warrants drawn by the mayor and

controller upon the treasurer of the city. The questions in the case relate to the right of the plaintiff to recover in any form.

There are two objections which it is proper to dispose of before proceeding to consider the other questions in the case. The first is, that the power of the city to contract a debt of this character was limited by the charter to one-third of the cost of the improvements; and the second is, that the indebtedness of the city already exceeded the sum of $50,000, over and above its annual revenue.

In respect to the first objection, the charter vested in the common council power to open streets and alleys, and to alter and improve the same, but provided that at least two-thirds of the expense of every improvement should be borne by the property adjacent. (Charter 1851, Art. 5, Sec. 2.) We see nothing in this provision to justify the construction contended for; and when taken in connection with other provisions of the charter, it is clear that such a construction is entirely inadmissible, and would lead to the grossest and most palpable injustice. The power to improve the streets necessarily included the authority to enter into a contract for that purpose, and it would be absurd to say that the city could not bind itself by a contract which it was legally authorized to make. It is certain that such a contract could not be treated as the contract of the property-holders, and an action maintained upon it as against them. Their liability was exclusively to the city, and the manner of its enforcement was pointed out by the charter. The remedy was limited to assessments upon the property itself. These assessments were to be levied and collected by the city, and it was evidently intended that the money, when received, should be paid into the city treasury. No provision was made for any other disposition of it, and no restriction was placed upon the right of the city to use it for any other purpose whatever.

In support of this objection, the counsel for the city relies upon the case of *McCullough v. The Mayor, etc., of Brooklyn* (23 Wend., 458). The question there was, whether the city of Brooklyn was liable for certain damages, which had been assessed in favor of the plaintiff, in contemplation of the

opening of a street upon his land. By the terms of the charter, the persons to be benefited by the improvement were to pay the damages; and these persons were required to deposit the amount with the treasurer of the city, whose duty it was to pay it over to the party entitled to receive it. The city had not taken possession of the property, and could not do so, until the damages were paid. There was no contract in the case, and no question in relation to the power of the city. The damages were to be paid in a particular manner, and it was held that the mere fact that an assessment had been made did not render the city liable. We do not question the authority of that case; but, in what respect it resembles the case at bar, we are unable to perceive. Here the city did not occupy the position of an agent. The proceeds of assessment were to be paid into the treasury, and when paid in, became the property of the city.

In respect to the second objection, it was provided by the charter that the common council should not create, nor permit to accrue, any debt or liabilities which, in the aggregate, with all former debts or liabilities, should exceed the sum of $50,000 over and above the annual revenue of the city, except in certain specified cases, and then only in a particular manner. We regard this provision as directory to the common council, and not as a limitation upon the city. It was too indefinite and uncertain to admit of any other construction. Of course, the amount of the annual revenue of the city was incapable of ascertainment in advance of its collection, and it could not have been intended that a debt contracted by the city should be valid or invalid as the revenue for the year might exceed or fall short of a particular amount. No consequence was attached to a violation of the charter in this respect, and the revenue was a matter so completely within the control of the city, that we must regard the provision as directory to the common council, or conclude that it was the intention of the legislature to furnish the city with the means of avoiding its debts and liabilities at pleasure. We are not disposed to adopt an interpretation so disparaging to the integrity of the legislature.

It is contended that in legal effect, this provision of the

charter and the clause in the constitution prohibiting the legislature from creating debts against the State are precisely similar. The difference is so palpable that the argument is without the semblance of plausibility. The limit prescribed by the constitution is fixed, certain, and definite. To determine when this limit has been reached, it is only necessary to ascertain whether the indebtedness of the State amounts to $300,000—a fact, the existence or non-existence of which is at least susceptible of ascertainment. The limit prescribed by the charter was indefinite, and entirely uncertain. When this limit had been reached it was impossible to ascertain. The amount of the annual revenue of the city depended, of course, upon the productiveness of the various sources from which its revenue was derived, and until the expiration of the year, and the revenue had been received, its amount could only have been the subject of surmise and conjecture. We cannot suppose that a provision so entirely uncertain was intended by the legislature to operate as a limitation upon the power of the city.

But even if we are mistaken in our construction of the charter there is still a clear and conclusive answer to both of these objections. It is well settled in relation to the contracts of corporations, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the charter cannot be permitted, in an action founded upon it, to question its validity. "It would be in the highest degree inequitable and unjust," says Mr. SEDGWICK, "to permit the defendant to repudiate a contract, the fruits of which he retains." (Sedg. on Con. and Stat. Law, 90.) In *Silver Lake Bank v. North* (4 John. Ch. R., 370), where it was alleged a foreign corporation had exceeded its powers in making a loan, Chancellor KENT said: "It would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in this collateral way, to decide a question of *misuser* by setting aside a just and *bona fide* contract." In *The State of Indiana v. Woram* (6 Hill, 37), it was contended that the Staten Island Whaling Company had no power, by its charter, to purchase or deal in State

bonds, and Mr. Justice BRONSON, in delivering the opinion of the court, said: "I agree with the counsel for the defendant that this company had no authority to purchase or deal in these bonds. But since the decision in *Moss v. The Rossie Lead Mining Co.* (5 Hill, 137), I do not see that a corporation can ever avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase. And if the company was bound I see no reason why the defendant should not also be bound by the contract." In *The Steam Navigation Co. v. Weed* (17 Barb., 378), Mr. Justice PARKER, in delivering the opinion of the court, said: "I am happy to come to the conclusion that the law will not sustain this most unconscionable defense. It ill becomes the defendant to borrow from the plaintiff $1,000 for a single day, to relieve his immediate necessities, and then turn round and say, 'I will not return this money, because you had no power by your charter to lend it.' We shall lose our respect for the law when it so far loses its character for justice as to sanction the defense here attempted." (See, also, *Chester Glass Co. v. Dewey*, 16 Mass., 94; *McCutcheon v. Steamboat Co.*, 13 Penn., 13; *Sackett's Harbor Bank v. Lewis County Bank*, 11 Barb., 213.) We shall show that this rule applies with equal force to all corporations, whether public or private.

Having disposed of the objections to a recovery upon the ground of a want of authority in the city, we now proceed to examine the question of the liability of the city independent of these objections. It is well settled that the contracts of corporations stand upon the same footing as those of natural persons, and depend upon the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter.

There is no difference in this respect between public and private corporations, for, in matters of contract a public corporation is regarded merely as a legal individual and treated in all respects as a private person.

Angell & Ames, in their work on corporations (Sec. 219), say: "The old rule of the common law undoubtedly was,

that corporations aggregate could contract or appoint special agents for that purpose, or any other, except for services of the most inferior and ordinary nature, only by deed. In England this rule has, in modern times, been greatly though gradually relaxed; and in our country, where private corporations of this kind for every laudable object have been multiplied beyond any former example, on account of the inconvenience and injustice which must, in practice, result from its technical strictness the rule has, as a general proposition, been completely done away. The course of modern decisions seems to place corporations, with regard to the mode of appointing agents and making contracts in general, upon the same footing with natural persons." The same authors (Sec. 238) say: "It having been established that corporations might contract otherwise than by their corporate seals—that they might make parol promises ether by vote or by their authorized agents, no reason could be found in technical principle or substantial justice why they should not be subject and entitled to the same presumptions as natural persons." In speaking of municipal corporations they say: "If the powers conferred be granted for public purposes exclusively, they belong to the corporate body in its public and municipal character; but if for purposes of private advantage and emolument, though the public derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company." (Id., Sec. 38.) And they add, in a note to the same section, that "it is upon the like distinction that municipal corporations, in their private character, as owners and occupiers of houses and lands, are regarded in the same light and dealt with accordingly." The same distinction exists in reference to contracts in respect to which all corporations stand upon the same footing as natural persons.

Seagraves v. The City of Alton (13 Ills., 366), is a strong case upon the question of the liability of a municipal corporation upon an implied contract. The action was for necessaries furnished a pauper, and the charter required the common council to provide for the support of all paupers within the limits of the city. TREAT, C. J., in delivering the opinion of the court, said: "In the present case the evidence tended

to the conclusion that Reeves was a pauper, and properly chargeable to the corporation. It also clearly appeared that the plaintiff, with whom Reeves resided, made repeated application to the city authorities for relief, which was refused. If Reeves was a pauper in fact, the plaintiff, by continuing to maintain him, pursued the course that humanity prompted and the law approved, and he ought to be renumerated." The jury had been instructed the plaintiff could not recover unless the necessaries were furnished in pursuance of an express contract with the corporation; and it was held that this instruction was erroneous, and the judgment, which was in favor of the corporation, was reversed. This question is elaborately discussed in the opinion of Mr. Justice FIELD, in the case of the *Gas Company v. The City of San Francisco* (9 Cal., 453), and we are satisfied that the conclusion there attained is not only correct in principle, but supported by all the authorities.

In *Ross v. The City of Madison* (1 Carter 281), the question was, whether the city was liable for an injury resulting from the negligence of its agents in the construction of a culvert. The culvert was constructed without express authority from the city, and it was contended that the city could not therefore be made responsible for the injury. But the court said: "The English rule was, and still appears to be, that corporations aggregate cannot enter into contracts of an important nature, except under their common seal. But in this country it is well established that the contracts of corporations rest upon the same footing as those of natural persons, and are valid without seal, whether expressly made by the corporation, or arising by implication from the general relations of the agents toward the corporation or from the ratification of acts done on behalf of the corporation by parties assuming to act as agents, although without sufficient authority."

In *The City of Dayton v. Pease* (4 Ohio, 80), the same question was involved, the injury for which the action was brought having been occasioned by the negligence and unskillfulness of an agent of the corporation. In speaking of the legal reasons upon which the liability of the corporation rested, the court said: "The liability of a private person under pre-

cisely such circumstances, rests upon one of the oldest and best settled doctrines of the common law. We have again and again affirmed that the liabilities of corporations, private and municipal, are no less extensive; and that the maxim *respondeat superior*, properly applies to them in the same manner and the same extent as in its application to the liabilities of private individuals." In reference to the double character of a municipal corporation, the court, after stating that such a corporation was not responsible for an injury resulting from the exercise of its public, judicial, or political powers, said: "But where a municipal corporation undertakes to execute its own prescribed regulations by constructing improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual, and as such owing all the duties to private persons, and subject to all the liabilities that pertain to private corporations or individual citizens. To this class most clearly belong the construction, repair, and maintenance of its streets."

In *Allegheny City v. McClarken* (14 Penn., 81), the question was as to the validity of certain scrip or notes, which had been issued without express authority from the city, and in the absence of any provision in the charter authorizing their issuance. The court said: "The object of all law is to promote justice and fair dealing, when that can be done without violating principle. We cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, where these contracts for a series of times were entered into publicly, and in such manner as, by necessity and irresistible implication, to be within the knowledge of the corporation. It was the acquiescence of the corporators, and the habit and custom of business of the corporation which induced the public to give credit to the scrip or notes, which was evidence of contract. But when, to this circumstance, we add that the corporators themselves received the value of these notes in the erection of improvements in the city, and enjoyed, and still enjoy the value of them, the conclusion is irresistible that the corporation ought to pay them, by the assessment of taxes upon the

corporators if it has no other available means. * * * One rule of law is often met and counteracted by another of equal force, so that although the corporators are in general protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they receive the avail and value of these acts, it is explicit evidence that they consented to and authorized them. They adopted the act, and are responsible to those who, on the faith of their acquiescence and approbation trusted their agents."

In *Underwood v. The Newport Lyceum* (5 B. Mon., 129), it was contended that the corporation had no power to contract the debt for which the suit was brought; but the court said: "A corporation, as is well established by the authorities, may be made responsible in an action on the case for a tort, and even in an action for a trespass, if, by its managers and authorized agents it commands the trespass to be committed, or sanctions and approves the act when committed. If, therefore, as a corporate body, it may be made responsible for perpetrating a wrong, to the injury of others, the power to do which their charter can never be presumed to confer, much more may a corporation be rendered responsible in damages for a breach of their assumpsit to strangers, who may be presumed to be ignorant of the powers by which they engage their services and induce them to expend their labor, time and means at their instance and for their benefit." The doctrine laid down by these authorities has also been repeatedly recognized by the English courts: In *Moodalay v. The East India Company* (1 Brown, Ch. R., 459), the Master of the Rolls said: "At the outset I thought the cases of a corporation and of an individual were different, but I am glad to have the authority of Lord TALBOT that they are not. * * * I admit that no suit will lie in this court against a sovereign power for anything done in that capacity, but I do not think that the East India Company is within that rule. They have rights as a sovereign power—they have also duties as individuals; if they enter into bonds in India the sum secured may be recovered here.

"So, in this case, as a private company, they have entered into a private contract, to which they must be liable."

In *De Grave v. The Corporation of Monmouth* (19 Eng. Com. Law, C. P., 109), the question was whether the corporation was responsible for certain weights and measures purchased by the mayor. It was shown that they had been taken from the boxes in which they were packed and examined at a meeting of the corporation, and that some of them had been subsequently used. It was objected that the corporation could only bind itself by its corporate seal, but Lord TENTERDEN said: "I think that the examination of these weights and measures by the corporation at the meeting in the jury-room was exercising an act of ownership over them, and that by so doing the corporation have recognized the contract."

It was laid down by this court in *Touchard v. Touchard* (5 Cal., 806), that a municipal corporation, in reference to all matters of contract, must be looked upon and treated as a private person and its contract construed in the same manner and with like effect as those of natural persons. And this distinction was subsequently recognized and acted upon in the case of *Holland v. The City of San Francisco* (7 Cal., 361). The principle upon which the distinction rests was discussed in *Bailey v. The Mayor, etc., of New York*, 3 Hill, 539; *Lloyd v. The Mayor, etc., of New York*, 1 Seldon, 374; and *Milhau v. Sharp*, 15 Barb., 210.

We do not propose to examine all the authorities in support of the propositions we have endeavored to establish. For the benefit of those who desire to pursue the subject farther, we refer to the following additional cases. *Bank of the United States v. Dundridge*, 12 Wheat., 64; *Delafield v. The State of Illinois*, 26 Wend., 192; *McComb v. The Town Council of Akron*, 15 Ohio, 474; *City of New York v. Bailey*, 2 Denio, 433; *Goodlove v. The City of Cincinnati*, 4 Ham., 500; *Bank of Chillicothe v. The Town of Chillicothe*, 7 Ohio, 358; and *Rhodes v. The City of Cleveland*, 10 Id., 159.

It is necessary to notice some of the authorities cited by counsel for the city, and relied upon as establishing a different doctrine in relation to the contracts of corporations.

In *Hodges v. The City of Buffalo* (2 Denio, 110), the question was, whether the corporation was liable for the cost of an entertainment furnished to the citizens and guests of the city, under a contract with the common council. Mr. Justice JEWITT, who delivered the opinion of the court, after stating certain general principles relating to the powers of corporations, proceeded to say: "The plaintiff's counsel, failing to find express authority to make expenditures for this purpose, insists that the claim can be sustained on the ground that the plaintiff, having furnished this entertainment, the corporation has received the consideration, and is bound to pay, although the engagement was made without legal authority. It is said to be analogous to a subsequent ratification by a corporation of the unauthorized act of the agent. I cannot concur in this view of the case. The doctrine referred to assumes that the principal had power to confer the requisite authority in the first instance.

"It cannot be maintained that a corporation can, by a subsequent ratification, make good the act of its agent which it could not have directly empowered him to do." This case may have been correctly decided, but its authority stands upon a very doubtful footing. It is in direct conflict with two cases previously decided by the same court: *Moss v. The Rossie Lead Mining Company* (5 Hill, 137), and *The State of Indiana v. Woram* (6 Id., 37). Besides, the right of the plaintiff to recover did not depend upon a ratification, but upon the fact that the corporation, having made the contract, had received the benefit of it, and could not, therefore, be permitted to question its validity. But, admitting the case to be properly decided, it cannot be regarded as authority in the case at bar. The decision proceeded solely upon the ground of a want of power in the corporation, and it was inferentially admitted that if the corporation had possessed the requisite power it could have been as effectually bound by a subsequent ratification as by a valid exercise of the power in the first instance. In the present case there is no doubt as to the existence of the power.

The case of *Halstead v. The Mayor, etc., of New York* (3 Conn., 430), is not in point. The suit was brought to recover

the amount of two drafts drawn by the defendants upon the treasurer of the city, payment of which had been refused. The defense was, that these drafts were without consideration and upon that ground the defendants obtained a verdict. On appeal it was held that the verdict was right, though three of the judges, including Chief Justice BRONSON, dissented.

The case of *Lake v. Williamsburgh* (4 Denio, 520), is analogous in principle to that of *McCullough v. The Mayor of Brooklyn*, to which we have already referred, and was decided upon the authority of that case.

In *The City of London v. Brainard* (22 Conn., 552), the corporation was enjoined from paying out money for a purpose not contemplated by the charter. There was no contract in the case, and the only question was as to the validity of a voluntary appropriation of the funds of the corporation.

The other authorities referred to seem to have been cited for the purpose of showing that a corporation possesses only such powers as are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted. This doctrine we understand to be perfectly well settled, and we have no disposition to question its correctness. The only difficulty is as to its application in particular cases and its effect when brought in contact with other rules equally well settled.

The doctrine contended for by the counsel for the city received the sanction of this court in *Seale v. The City of San Francisco*, decided at the July term, 1858; but a rehearing having been granted in that case, it is still undetermined, and the same questions are presented to us, unembarrassed by previous decisions of the court. In the lengthy opinion of Mr. Justice BURNETT, many authorities are cited as supporting the conclusion there attained. Some of these authorities we have already noticed, and we propose, at present, only to refer to those cases emanating from this court.

In *Phelan v. The County of San Francisco* (6 Cal., 531), the plaintiff had sold to the Court of Sessions, for the use of the county, a certain lot of land, for which he was to receive the sum of sixty thousand dollars.

The Court of Sessions took possession of the property and

continued to manage and control it until the organization of a board of supervisors, when it passed into their hands, and was afterward controlled and taken care of by them. The action was brought to recover the purchase-money; but it was held that the Court of Sessions had no power to make the contract, and that the whole transaction was void. It was also held that the acts of the board of supervisors did not amount to a ratification of the contract, so as to bind the county. "Nay, more," said the court, "we are satisfied that a deliberative body like the board of supervisors cannot be bound by acts *in pais*, but that the best and only evidence of its acts and intentions is to be drawn from the record of its proceedings." This was one of several reasons given by the court for its decision, and we do not pretend to say that it was not of itself entirely sufficient. It was not regarded as essential to the determination of the case, and may have been stated in broader terms than the court intended to employ. We are not required to pass upon the question of its correctness, and it is only necessary for us to say that no such rule exists in reference to the private transactions of a municipal corporation.

In *Lucas, Turner & Co. v. The City of San Francisco* (7 Cal., 463), the only question passed upon by the court was the sufficiency of a demurrer to the complaint. Mr. Justice BURNETT, in delivering the opinion in the case, commenced by saying: "The decision of the court below was given against the plaintiff upon a demurrer to the complaint. The complaint contains nine counts, setting forth the cause of action in different forms, and the demurrer was to the whole complaint, and to each count separately, and was sustained as to all the counts. The objection raised by the demurrer can only apply to some of the counts, and for that reason, if for no other, the judgment of the court below must be reversed."

The learned judge then proceeded to discuss the case upon the merits, and arrived at the conclusion that, though the judgment must be reversed, the city would eventually be entitled to recover. The reasons assigned were that the city could only bind itself by an ordinance, and could not be estopped by acts *in pais*. MURRAY, C. J., and TERRY, J., signed a special concurrence, as follows: "We concur in reversing the

judgment of the court below on the first ground stated in the opinion of Judge BURNETT, but differ with him as to the other questions passed upon in his opinion."

If this case is to be regarded as authority at all, it stands in direct antagonism to *Seale v. The City of San Francisco*, and expressly repudiates the doctrine that a municipal corporation cannot be bound by acts *in pais*.

In *Holland v. The City of San Francisco* (7 Cal., 361), the questions involved were entirely different, and it will be sufficient for us to determine whether we will adhere to the principles of that case when the same questions are again brought before us.

From this examination of the authorities it is evident that the doctrine contended for by the counsel for the city cannot be maintained. The theory is that the municipal corporation can only be bound by a contract to which it has expressly assented, and that such a corporation is exempt from the operation of the rules which relate to and govern the contracts and liabilities of individuals. We readily admit that the powers of the corporation are derived solely from the act creating it; and that, as a general rule, these powers must be exercised in the particular mode pointed out by the charter. It does not follow, however, that even a want of authority is, in all cases, a sufficient test for the exemption of a corporation from liability in matters of contract. Of course, an executory contract, made without authority, cannot be enforced; but a different question arises when the contract has been executed, and the corporation has received the benefit of it. In such a case the law interposes an estoppel, and will not permit the validity of the contract to be called in question.

It remains to be determined whether the plaintiff has made out a case upon which he is entitled to recover, and if so, to what extent? It is shown by the evidence that the improvements mentioned in the complaint were constructed for the exclusive benefit of the city and its inhabitants; that the improvements were of a valuable and permanent character, and were constructed in pursuance of certain contracts entered into with an officer of the corporation, who executed the same in his official capacity; that, in making the improvements, reli-

ance was placed upon the validity of these contracts and the obligation of the city to pay as therein provided; that the improvements were made under the immediate supervision of an officer of the city government, and, when completed, were approved and received by him on behalf of the city; that the authorities of the city were fully informed of these facts, and took no steps to repudiate the contracts or enlighten the plaintiff as to the disposition of the city to pay for the improvements. Such other facts as are necessary to be noticed will be referred to in connection with the subject to which they relate.

It is not disputed that the city received the benefit of the improvements for which the plaintiff seeks to recover; and so far as these improvements are concerned the question is whether there was any contract, express or implied, to pay. The fact that the improvements were constructed for the benefit of the city, is sufficient to raise the presumption of a contract; and it will not be contended that there is anything in the evidence to destroy the effect of this presumption. But in our opinion the plaintiff is entitled to recover upon the contracts under which the improvements were made. It is true there is no evidence that the agent who signed these contracts on behalf of the city was *expressly* authorized to do so; but it sufficiently appears that the city authorities were cognizant of the facts, and their silence, under the circumstances, was equivalent to a direct sanction of the acts of the agent, and estops the city from denying his authority. It was well known that these contracts involving, as was supposed, the liability of the city, were the only considerations inducing the construction of the improvements, and now that the improvements have been completed, and the city has received the benefit of them, it is too late to repudiate the contracts and avoid responsibility. It is necessary to enumerate the various acts of the city government in relation to these contracts. They were acquiesced in from the commencement to the completion of the improvements, and until the city had received all the benefit to be derived from their performance, their validity was never called in question. We think that upon no principle of law or equity can this be done now. It would be

a fraud upon the plaintiff to permit it, and it is a proper case in which to invoke the protection of an estoppel.

In reference to the warrants, the rights of the plaintiff stand upon a different footing. They are drawn upon a particular fund and cannot, therefore, be regarded as either bills of exchange or promissory notes. The designation of the fund was not intended as a mere direction to the treasurer, and such is not its legal effect. He had no discretion of the mode or means of payment. He was required to pay from moneys belonging to the fund mentioned in the warrants and was not at liberty to resort to any other source for that purpose. The effect of the warrants must be controlled by the terms and conditions expressed upon their face, and these are too plain to admit of any doubt as to their construction. The failure to pay them did not alter their nature, or so change their legal effect as to render them the proper subjects of an action. The only remedy was an action upon the original indebtedness, and in such an action it is possible that the warrants might have been used as evidence for the purpose of establishing the indebtedness. It is clear, however, that no action can be maintained upon the warrants themselves.

Our conclusion is that the right of the plaintiff to recover is limited to the amount specified in the contracts to which we have referred, and legal interest upon such amount. The judgment is for a larger sum than the plaintiff is entitled to recover, and must, therefore, be reversed. Upon the return of the cause the court below will render a judgment in accordance with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

DOCTRINE IN CASE OF EXECUTED CONTRACTS.

NINETEENTH SELECTED CASE.

Allegheny City v. McClurkan & Co.*

A municipal corporation is liable for the contracts of its officers, even when not expressly authorized, when such contracts were entered into publicly, and in such a manner as to be within the knowledge of the corporators. The city of Allegheny is, therefore, liable for scrip under the denomination of five dollars, issued by its corporate officers, with twenty per cent interest thereon, by the provisions of the act of 12th April, 1828, forbidding the circulation of small notes.

The act of 12th April, 1828, is not repealed by the resolution of 1st June, 1842; this latter merely increased the penalty on issuing such notes.

Municipal corporations are within the provisions of the act of 1828.

A suit against such a corporation for issuing small notes is not barred by the sixth section of the act of March 29th, 1785, because not brought within two years after the issuing of the notes—the twenty per cent is not a *forfeiture* incurred at the time of issuing the notes.

Though the holders of such notes may have distinct remedies against the corporation and the officers who signed the notes and gave them currency by their names, they can have but one satisfaction.

These were writs of error to the District Court of *Allegheny county.*

These were two suits brought by McClurkan & Co., to the same term. Writs issued in August, 1849, the one against the mayor, aldermen and citizens of Allegheny, for issuing the notes or city scrip in question; the other against Harry Campbell, for having, in his capacity of mayor, signed the notes on which the suit was founded.

The *narr.* contained a schedule of the notes, dated in 1847, 1848 and 1849, amounting in all to $3,942.

They were actions for debt for the sum of $3,942, for that amount of notes or city scrip, issued by the defendants, and held by the plaintiffs; and also for twenty per cent interest thereon, in pursuance of the act of Assembly, passed 12th of

* Reported in 14 Pa. St., 81 (1850).

April, 1828, forbidding the circulation of small notes under the denomination of five dollars.

And thereto the defendants pleaded that they had not issued and circulated the notes declared upon, and issue was joined thereon. And afterwards, on the 28th February, 1850, the same issue came on to be tried before Hon. WALTER H. LOWRIE, Assistant Judge of said court, and on the trial thereof, the plaintiffs, in order to maintain and prove the issue, gave in evidence certain ordinances of the select and common councils of the city of Allegheny, authorizing the issue of said notes, and, therefore, a verdict was rendered in favor of the plaintiffs, and the following question was reserved by the court; viz., Can the select and common council of the city of Allegheny, a municipal corporation, subject their constituents to the penalty of the act of 12th April, 1828, concerning small notes, etc., by creating a circulating medium of small notes, etc., contrary to the provision of that law? If it be decided that the councils may thus bind their constituents, then judgment is to be entered for the plaintiffs for the amount of the notes declared upon, with twenty per cent interest.

If otherwise, judgment is to be entered for the defendants, or for the plaintiffs for the amount of said notes, without interest, as the court shall adjudge.

Afterwards, on the 16th of April, 1850, the said reserved question came on for hearing before the court, and was argued by counsel, and on consideration thereof, was decided in favor of the plaintiffs, and judgment accordingly entered in their favor. And inasmuch as the said matters do not appear by the said record aforesaid, the counsel for the defendants did then and there except to the decision of the court on the said question.

It was assigned for error, and the court erred:

1. In sustaining the demurrer.

2. In entering judgment on the point reserved in favor of the plaintiffs.

3. In entering judgment for a greater sum than was declared for.

The opinion of the court was delivered September 23d, by COULTER, J.

The charter or act of Assembly incorporating the city of Allegheny was not produced or read on the argument; but I take it for granted that it contains no express authority to the corporation to issue such notes as those embraced in this action. But it does not follow that the corporators are therefore not answerable for them in their corporate capacity. They have received value for them in the various public works and improvements erected and made in the city through their instrumentality, and it hardly comports well with fair dealing, that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited agents, and with their silent acquiescence. It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract undoubtedly, and if a series of contracts have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank which has long been in the habit of doing business of a particular description would not be exonerated from liability because such business was not expressly authorized in its charter.

The object of all law is to promote justice and honest dealing when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, where these contracts, for a series of times, were entered into publicly, and in such a manner as by necessary and irresistible implication to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business of the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract. But when to this circumstance we add that the corporators themselves received the value of these notes or contracts in the erection of improvements in the city, and enjoyed and still enjoy the value of them, the conclusion is irresistible that the corpora-

tors ought to pay them by the assessment of taxes on the corporators, if it has no other available means. The debt is due by positive engagement—it is due *ex æquo et bono*—in the forum of conscience, and the forum of law. One rule of law is often met and counterchecked by another of equal force, so that although the corporators are in general protected from unauthorized acts of their agents, yet at the same time a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them. They adopt the act and are responsible to those who on the faith of such acquiescence and approbation trusted their agents. I speak now upon the basis of such contracts not being prohibited by statute. It is contended, however, that the issuing of such contracts were positively prohibited by the statute of the 12th of April, 1828. That act in the first section prohibits corporations from issuing such contracts or notes as those embraced in this action, and the second section imposes a penalty of $5 for so doing, so that according to the usual construction of such statutes, the notes would be void and irrecoverable, as the statute imposes a penalty on their issue, if there was not in the statute itself the seed and elements of a contrary conclusion.

The third section, however, provides that no such notes or bills as described in the first section, shall be held or taken to be void or null by reason of the said statute, but the suit may be brought and sustained, notwithstanding anything contained in the act, and a recovery be had for the principal sum due with interest, as provided in the fourth section, at the rate of twenty per cent per annum, from the date when such notes were issued.

If the first and second sections are the bane of the noteholders, the other sections are its antidote, and these remedial provisions are in accordance with the principles stated in the commencement of the opinion; to wit., that although the issuing of the notes may not be authorized, yet the corporation is bound, having received value, and deluded the public into a belief that they were good and valid. The great

object of these remedial provisions was to protect the public, whilst the first and second sections of this act were to deter from such contracts. The second contained a penalty *eo nomine*, but if, in defiance of that, the corporation issued the scrip, still they were held liable for the amount, with a large additional interest, and this was the true policy. For if the notes had been made utterly void and irrecoverable, the statute would have played into the hands of the corporators, and enabled them to accomplish the very object which it was the design of the legislature to prevent, that is, to defraud the public.

The provisions of the statute are very plain, and intelligible. They announce two propositions: First, you violate the law, and incur a penalty if you issue small notes under five dollars, and put them in circulation currently; but if you will violate the law, and issue them and incur the penalty, you shall pay the holder the uttermost cent you engage to pay on their face, and in addition, if he is compelled to bring suit, you shall pay interest at the rate of twenty per cent per annum. We endeavor, proclaims the sovereign authority of the State, to prevent you, and save you, but if we cannot, still we will not assist in defrauding the public; you shall pay the innocent holder of your contracts every cent you promise, and if you put him to trouble, and the delay of a lawsuit, you shall pay in addition twenty per cent interest. Any other course on the part of the legislature, would have been like a man flaggellating himself because he had received injury from another. The legislature did not choose to punnish the public who had innocently received such notes, but endeavored to punish those who had unlawfully issued them by compelling them to redeem their engagements with suitable interest, a very sensible and judicious policy, which we will endeavor fairly to carry out.

The statute of 12th April, 1828, does not, therefore, make these bills and notes null and void in the hands of the holder, but, on the contrary, does expressly make them valid and recoverable in the hands of the holder, and good against the corporation. It is alleged, however, by the corporation, that the act of 1828 is repealed by the resolution of the legislature passed on the 1st of June, 1842. This act, however, does noth-

ing more than increase the penalty for issuing the notes. The penalty in the act of 1828 is $5 for the issuing of every note—the penalty in the act of 1842 is $50. It is admitted that a subsequent act, covering the whole subject-matter of a former one, superseding and supplying it, does impliedly repeal the former. But implied or inferential repeals of former statutes are not adopted by the courts upon light grounds, because if the legislature intended a repeal nothing was more easy than to say it. It would be the most covert and most dangerous mode of judicial legislation and the most susceptible of abuse. There is not a shadow of intent manifest in the act of 1842 to repeal the act of 1828; and what is decisive against its being a repeal by implication is, that it does not cover the whole ground, and, therefore, does not supply the act of 1828. It does not touch the remedial parts; it has no allusion to the validity or recoverability of the notes, worthless or valueless in the hands of the holders who had received them for value. It would have been a suicidal policy as it regarded the public, a wanton infraction of the remedial parts of the act of 1828, without motive, design, or effect, other than that of assisting the corporations to evade the liability imposed upon them by that act, on the faith of which the public had received such notes. It would have the effect of an *ex post facto* law in its most odious features, by rendering that invalid which was made of value by a previous law.

Whether the penalty in the act of 1842, which is its whole form and substance, absorbs the penalty in the second section of the act of 1828, I stop not to enquire. That is of no consequence in this proceeding. But it is very clear, and so ruled, that it does not repeal or impair the remedial parts of the act in favor of noteholders nor touch their remedies. It alters or increases the penalty as a crime, making it indictable, but alters not the civil liability.

It is almost superrogatory to make any observation on the point which assumes that the act of 1828 does not reach or affect municipal corporations. Because, if we allow to the legislature of that year any sense, any knowledge of the history of the times, we must be constrained to admit that municipal corporations were chiefly in the legislature's mind.

There were previous enactments on the subject in relation to banks. But a flood of these small notes, poured out before 1828 from almost every municipal corporation in the State, had fairly deluged the Commonwealth. Every man's pocket had them, and every man's fingers were made greasy by them. We doubt not the intent of the legislature. The words of the act are ample to embrace them. The existing evil required them to be embraced, and if they had not been embraced the legislation would have been totally defective. They were clearly within the mischief, and as clearly within the enactment.

The remaining point to be examined is whether these suits are barred by any statute of limitations. It is not pretended that they are barred by the statute of limitations, properly so called, passed March 27, 1713. But it is contended that they are barred by the sixth section of the act of March 26, 1785, which provides that when a suit is brought to recover any forfeiture upon any penal act of Assembly, when the forfeiture is limited to the Commonwealth only, it shall be brought within two years after the offense is committed, and when the forfeiture is limited to the Commonwealth and to any one who shall prosecute in that behalf, such suits shall be brought within one year next after the offense was committed, This point assumes as a postulate that the twenty per cent is a forfeiture incurred when the offense was committed. But there was no forfeiture at the time of issuing the notes, except for the five dollar penalty, properly so called. The twenty per cent would not accrue until time had run, and would never accrue if the notes had been honestly redeemed without suit. The act provides that in such suits or actions (that is, those brought for the recovery of the bills), if the same shall be determined in favor of the plaintiff, judgment shall be rendered for the principal sum due on such notes. together with interest, at the rate of twenty per cent per annum. Here is no forfeiture to the Commonwealth alone, nor limited to the Commonwealth and any person who shall prosecute for the forfeiture. The category of the statute of 1785 does not occur.

There is no forfeiture of any sum to the Commonwealth or

anybody and the Commonwealth, except as to the five dollar penalty. The additional rates of interest is a subsequent matter to the commission of the offense of issuing the notes, and accrues only upon the suit brought for the notes, and judgment being entered for the plaintiff therein. By the act of the 30th of March, 1821, regulating bills of exchange, accumulated or increased interest or damage is given in certain cases of protested bills. Thus five per cent when the bill is drawn upon persons in any other State than Louisiana, and protested, in addition to the common interest, costs and charges is given, and when it is drawn on Louisiana, ten per cent; and so when drawn on various other quarters of the world there is a gradation of twenty-five per cent. Yet it has never been held that this was a penalty, and brought the limitations of 1785 down upon the holders of the protested notes or bills. Like the case in hand it is a civil, not a penal remedy or proceeding; such as a *qui tam* action for a future penalty. It is given as compensation to the holders of the notes in either case for additional trouble not contemplated in the original contract. But admitting that the limitation of the act of 1785 does apply (which, for myself, I very much doubt), it is ruled by this court that it is a limitation for two years, and that saves all the notes embraced in this suit, inasmuch as this suit is not brought in the name of the Commonwealth for the use of any one who prosecutes for a forfeiture.

The limitation of one year in the act of 1785 cannot apply, unless we do violence to the words of the act and substitute a phraseology of our own. But, instead of enlarging the construction, I would incline to the most rigid adherence to the words of the act. It was passed long before these exigencies had occurred or were contemplated by the framers of our statutes, and if applied as contended for, would, in a great measure frustrate the intents of the act of 1828. The limitation, therefore, of one year does not apply to these suits.

The plaintiffs in error might have avoided this accumulated or increased interest, if they had provided for the payment by suitable means or actually paid the notes, as it was their duty to do by the tenor of their engagements. But instead of doing

that, they recklessly folded their arms, whilst many a poor and worthy man and woman suffered by their acts.

But having put on a bold and swashing defiance of the policy and laws of the State, and playing their cards, reckless as to who suffered, it remains for the man who has expended his toil and his sweat, and his means for these notes to play his, and claim the benefit of the laws.

We cannot permit our mind to be swerved by any mystification of legal principles or any refined subtlety of distinction. The corporation is bound by law to pay these notes, and they are bound by law, when suit is brought and judgment is rendered against them, to pay twenty per cent interest.

I may add, however, that in the opinion of this court, although the plaintiffs are allowed by the act distinct remedies against those who issued their notes and gave them currency by their names, that, nevertheless, they are entitled to but one satisfaction—the face of the note and twenty per cent interest, on the same principle that the indorser or holder of a negotiable note may bring an action against the maker and each of the indorsers, and recover against them severally, but can have only one satisfaction; and so as to joint trespassers, although a suit may be maintained against each trespasser, only one satisfaction can be recovered.

JUDGMENT AFFIRMED.

NOTES.

Cases irreconcilable.—It is evident that some of the doctrines of the foregoing leading cases are contradictory and irreconcilable; and especially are they irreconcilable with the doctrine maintained in some of the leading cases relating to the liability of private corporations on executed *ultra vires* contracts, and with the doctrine that a recovery may be had of the consideration of such contracts, where a recovery upon the contract itself is not allowed.

In the case of *Zottman v. San Francisco*, 20 Cal., 96, the facts, as stated by the court, were substantially these: In 1854 the city of San Francisco entered into a contract with the plaintiff and another for the improvement

of certain public property of the city, known as "Portsmouth Square," in accordance with certain plans and specifications, the work to be performed under the supervision of a superintendent to be selected by the city council, and to be completed to the satisfaction of a special committee to be appointed by such council. A portion of the work consisted of the construction of an iron fence around said square. The contract was made pursuant to an ordinance of the city, and no question was raised as to its validity.

Afterward, the special committee and the superintendent, upon an examination of the plans and specifications, came to the conclusion that the work about the fence should be made more permanent and durable than provided for in the contract, and that instead of a wooden base for the fence, it should be stone; and, as no provision was made in the contract for painting the fence, and this was deemed essential to preserve it from rusting, and to render it useful as well as ornamental, the contractors were ordered by them, in the presence of the city attorney, the president of the board of aldermen and different members of the board, to perform this extra work, and assured by them that they should receive pay therefor. This extra work was done, with the full knowledge of all the members of the city council and with their approval, but it did not appear that the work was directed or accepted by any action of the city council. A bill was presented by the contractors to the special committee for the extra work, but it did not appear that it was presented to or acted upon by the board. The plaintiff, having acquired the interest of the other contractor by assignment, brought the suit to recover for the extra work. The court below held there was no evidence of any ordinance of the city authorizing the extra work, and judgment was rendered against the plaintiff, from which he appealed.

FIELD, C. J., who delivered the opinion of the court, observed: "It is not pretended that the superintendent or special committee had any authority to enter into any contract on behalf of the city. Their powers were limited to the execution of the original contract and did not embrace the making of a new or different one. But it is contended in substance: 1. That as the employment of the contractors to perform the extra work, which included the furnishing of the necessary materials, was known to the individual members of the common council, and was approved by them, an adoption and ratification of the employment by the corporation are to be presumed; and, 2. That the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract. The positions of the learned counsel of the appellant are not stated in this form, but his argument is to that purport. If the positions thus stated cannot be maintained his case must fail.

"1. An examination of the clauses of the charter of the city then in force, with reference to improvements and to contracts for work, will show the untenable character of the first position. The charter was the source of all the power which could be exercised on the subject. Looking to that instrument we find that it vested in the common council the legislative power of the city and clothed them with exclusive authority over improvements of the city property, and prescribed the mode in which the authority should be exercised. It empowered the council to pass 'all proper and necessary laws'

for such improvements (Art. 3, Sec. 13), and it required 'every ordinance providing for any specific improvement' to be published after its passage by one board, and before its transmission to the other, with the ayes and noes, in some city paper (Art. 3, Sec. 4), and it declared that all contracts for work should be let to the lowest bidder, after notice given through the public journals (Art. 6, Sec. 7). These provisions whilst conferring authority upon the common council, also fixed the bounds of the action. Beyond them they could not go, and give them validity. They could, therefore, only provide for any specific improvement of the city property by the passage of a law, that is, an ordinance, for that purpose.

"'Laws' and 'Ordinances,' when applied to the acts of municipal corporations are synonymous terms, and were so used in the charter (Art. 3, Sec. 3). And to apprise the public of the improvement contemplated, and thus give an opportunity to suggest objections to the same, and to prevent improvident legislation on the subject, the clause was inserted in the charter requiring the publication of the ordinance for the improvement, after its passage by one board before its consideration by another board. And even when the ordinance had become a law, to prevent favoritism or fraud on the part of the common council or the officers of the city, the provision was added for giving the contract to the lowest bidder after due notice in the public journals. A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city. Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made, by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally they could not by any subsequent approval or conduct impart validity to the contract. But we go further than this: the common council could not even by any subsequent action, give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; when the mode in which their power on any given subject can be exercised is prescribed by their charter, that mode must be followed. The mode in such cases constitutes the measure of power." *Head v. The Provident Ins. Co.*, 2 Cr., 156; *McCracken v. San Francisco*, 16 Cal., 591; *Farmers' Loan & Trust Co. v. Carroll*, 5 Barb., 649; *New York Fire Ins. Co. v. Ely*, 5 Conn., 568; *Brady v. Mayor of New York*, 16 How. Pr., 432.

On the question of liability on an implied contract on the ground of having received the benefit of the extra work, Chief Justice FIELD observed: "The second position of the appellant that the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract is as untenable as his first position. Indeed the argument which meets the first position shows the unsoundness of the second. If the common council could not, by any subsequent action, affirm

and ratify a contract originally made in disregard of the requirements of the charter, so as to fasten a liability upon the corporation, it is difficult to perceive how the benefit which may have resulted to the city in the improvement of her property from the performance of the unauthorized and illegal contract could create any such liability. We do not question the general doctrine that where one receives the benefit of another's work he is bound to pay for the same, but we deny its application to a case like the present. The extra work for which the action is brought was performed without the request of the corporation; it could therefore, of itself, impose no obligation upon the corporation any more than if the contractors had made any other improvements to the city property upon an unauthorized contract with individual members of the common council, or upon their own voluntary action independent of any such contract. The extra work having been thus performed without request the common council had no authority after it was performed to agree to pay what it was reasonably worth. There is indeed no evidence in the record that the extra work was ever considered by either board; but we do not rest our opinion upon the want of evidence as to the action of the common council on the subject, but upon the want of power. They could not, as we have already shown, from the restrictions imposed by the charter upon their powers, have made a valid contract in advance to pay the contractors the reasonable value of the extra work—the charter requiring all contracts for the improvement of the city property to be given out to the lowest bidder, and of course at a fixed price, after notice of the contemplated improvement in the public journals. What they thus had no authority to agree in advance to pay for the work, they had no authority to agree to pay after the work was completed. * * * To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by law upon the party sought to be charged against making in direct terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect whether he will accept of the work, and where such election will or may influence the other party with reference to the work itself. The mere intention and use of the benefit resulting from the work where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment. Thus, if one person should erect a cottage upon the land of another without his request the conduct of the architect could not be affected by a refusal of the owner of the land to accept the building. The architect could not, upon such refusal, remove the building, it having become attached to and a part of the freehold; nor would the owner of the land be deemed to have accepted the building merely because he had not chosen to tear it down, or had seen fit to use it in connection with his land. From the necessity of the case, the owner receives the benefit of the building by reason of his right in the soil, and not from any supposed acceptance, without subjecting himself to any obligation to payment. So, too, in the present case, from necessity the corporation received the benefit

of the stone base to the iron fence around Portsmouth Square, and the painting of the iron fence without incurring any liability therefor." See, also, *Bartholomew v. Jackson*, 20 Johns., 28; *Ellis v. Hamlin*, 3 Taunt., 52; *Smith v. Brady*, 17 N. Y., 173; *Bonsteel v. Mayor, etc.*, 22 N. Y., 162; *Smith v. Brady*, 17 Id., 173; *Cunningham v. Jones*, 20 Id., 486. Following the case of *Zoltman v. San Francisco*, is the case of *Hague v. City of Philadelphia*, 48 Pa. St., 527.

The action was in assumpsit, by the plaintiff against the city of Philadelphia, for extra work done by him in the erection of a bridge over the Schuylkill River. The act authorizing the erection of the bridge, provided, "that before the site, plans, and specifications are agreed upon by the county commissioners, the same shall be submitted to the county board, and a majority of said board shall confirm the same before commissioners shall be allowed to advertise for proposals as before mentioned."

It also provided that the "proposals should be opened in the presence of, and submitted to, the county board," and that "no contract for building such bridge as aforesaid shall be made and entered into by said commissioners, without the consent, first had and obtained, of a majority of said county board."

The plaintiff was employed by the commissioners to build the bridge, under the authority of said act and entered into a contract therefor with said commissioners, but afterwards the site for the location of the bridge was changed, and certain necessary extra work and materials were furnished by the plaintiff, by the direction of the county commissioners aforesaid.

On the trial the plaintiff offered to prove that the location of the bridge was changed by direction of said commissioners, in consequence of the damage which said location would cause to private property and the public treasury in consequence of the streets, necessarily required to be opened to suit said location, and that this was done after the work had progressed for some time on the original location; that the plaintiff objected to such change; but that said commissioners insisted upon it; that it was agreed by and between the plaintiff and said commissioners that the plaintiff should be paid by the county for any additional expense incurred by reason of such change; and that the plaintiff proceeded accordingly to build the bridge on said new site, and furnished the extra materials and labor for which he claimed pay.

He also offered to prove that extra work and materials, not specified in the original contract, but found necessary to strengthen the bridge, were furnished by the plaintiff, by direction of the commissioners aforesaid, prior to 1854, and by the commissioners of highways, under the direction of the city councils in and after that year; also, that the city had admitted each and both of the claims, by payment on account; and that the county commissioners appointed a superintendent, who was continued in office under the councils since the consolidation of the city, whose duty it was to superintend the work, and that all materials now claimed for were furnished under his superintendence, and approved by him.

These offers were rejected by the court, and a non-suit ordered, which were the errors assigned in the Supreme Court.

In this case, AGNEW, J., observes: "Nothing can be clearer than the in-

tention of the legislature expressed in this act to limit and control the county commissioners in carrying out the authority to build the bridge. They are made to play a part wholly subordinate, and in subjection to, the county board. Their duty is to prepare the way for the contract, to sign it, and have it carried into execution; but the essential authority to decide its terms, and authorize its execution, belonged to the county board. It follows, necessarily, that there was no authority in the commissioners to change the site, the terms of the contract, or the plan of execution. They had not a shadow of right to do so. To admit it would be to strip the public of that protection which the act plainly intended to give by the restrictions it imposed; for to alter the contract in these essential elements, requires all the authority to make it. The change of site might cause, not only immense additional outlay, but the loss also of benefits which it might be supposed were within the view of the county board in their selection. Changes in plan and specifications may open a wide door to many evils, not the least of which are fraud and favoritism.

"All experience teaches the utter impossibility of wholly preventing unfairness, and advantage taken in the execution of public contracts, even with the most vigilant watchfulness of the public interest. If, in addition, courts of justice hold that public servants can without authority bind the public for extras, even in proper and honest cases, they establish a principle which will greatly add to the demoralization of public contracts, and the means of robbing the treasury whenever fraud and dishonesty can succeed in covering up wrong. Now more than ever do we need a rigid enforcement of public contracts, and a stricter moral discipline to defeat the varied plans by which money is taken from the treasury without authority. The older we grow as a people, the more systematized and difficult of detection do the schemes become for plundering the public; and among them all, none are more prominent or successful than those which concern contracts and jobs. The very elections of the people are sometimes guided and controlled by the unseen hands of rapacity. Fraudulent claims, fraudulent prices, fraudulent receipts, and fraudulent practices; are often winked at, or shared in by officials in disregard of honor, honesty, and oaths." See, also, *Lehigh County v. Bleckner*, 5 W. & S., 181.

To the same effect is the decision in the case of *The Mayor, etc., of Baltimore v. Reynolds*, 20 Md., 1, where the court say: "Instead of a contract for work to be done according to plan and specification agreed on, here is an agreement which authorizes the parties to abandon the plan and specifications which they have just declared they had adopted, and execute the work according to future directions for a fair and reasonable allowance, to be ascertained by one of the parties thereto or by arbitration. That is, the parties are to be remitted to the remedies resorted to where there is no express, but only an implied contract, a *quantum meruit* or *quantum valebat*. It is impossible to find in the resolution [a resolution of the mayor and city council of Baltimore authorizing the city commissioner to advertise for proposals for building a jail, to be advertised in the daily newspapers of the city, and empowering him with the consent of the mayor to enter into a contract for the same under certain restrictions and according to a certain

plan and specifications] any warrant for these extraordinary clauses in the articles.

"The appellants never designed to commit the credit of the city to the custody of the city commissioner to be pledged at his discretion, in the erection of any alterations or improvements, without plan, specification or price, previously ascertained and agreed on. They did not delegate to him the power to determine the amount to be paid for the work, except in the manner prescribed by the resolution. Least of all have they authorized him, in case of difference of opinion to submit claims against them to an arbitrator, whose decision shall be final and conclusive." See, also, *Mayor of Baltimore v. Eschback*, 18 Md., 282; *Delafield v. The State of Illinois*, 26 Wend., 192; opinion by VERPLANK, Senator.

The doctrines of the preceding cases in this note are in conflict not only with the leading cases which we have copied, but many of the adjudications in relation to the contracts of private corporations. If they are correct, a distinction must be drawn between municipal and private corporations in the application of the doctrine of *ultra vires*.

In *Zottman v. San Francisco, supra*, it appeared that the charter of the city gave the city council power to make all proper and necessary laws for the city, and clothed them with exclusive authority over improvements of the city property, and especially authorized them to pass all proper and necessary laws for such improvements; but required "every ordinance providing for any specific improvement" to be published after its passage by one board, and before its transmission to the other with the ayes and noes in some city paper; and that "all contracts for work" should be let to the lowest bidder after notice given through the public journals. "These provisions," observes Mr. Justice FIELD, "whilst conferring authority upon the common council, also fixed the bounds of their action. Beyond them they could not go and give validity to their acts."

Then, if the provisions of the charter in reference to the improvement of the city property in this case had been complied with, except that the contractors were not the lowest bidders, the contract, for this reason, would, under all circumstances, be void. If the bids offered were sealed and secret, or if they were suppressed and a knowledge of the same withheld from the contractors, and no record made of the same; or even if the record should be fraudulently made to show that the contractors were the lowest bidders, when in fact they were not, this would, under the decision in this case, make the contract null and void.

The corporation, through its common council, would have power in such a case to make a contract, except for the fact that the other contracting party was not the lowest bidder, and he might well be presumed not to have a knowledge whether or not he was the lowest bidder.

It was observed by SAWYER, C. J., in *The Miners' Ditch Company v. Zellerbach*, 37 Cal., 586: "From the cases cited it very clearly appears that the question, as between stockholders and the corporation, is very different from that which arises between the corporation itself and strangers dealing with it, and the principle established, where the contest arises between strangers and the corporation, is whether the act in question is one which

the corporation is not authorized to perform under any circumstances, or one that may be performed by the corporation for some purposes, but not for others. In the former case the defense of *ultra vires* is available to the corporation as against all persons, because they are bound to know from the law of its existence that it has no power to perform the act. But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose of the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers; and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose [and we might add, under any circumstances] the contract cannot be enforced, otherwise it can."

Now, if the same rule is applicable equally to municipal as to private corporations, how do the broad propositions of the court in the case of *Zottmann v. San Francisco* stand, tested by the rule above laid down and applied to the supposed case, where the non-conformity with the directions of the charter was the failure to let the contract to the lowest bidder.

A contractor looking over the charter would discover that the common council of the city had the power to make contracts for the improvement of the city property, at least, under certain conditions or circumstances. They had the power, then, to make the contract in the supposed case, on the condition that they let the work to the lowest bidder, which they failed to do. Does this not bring the case within the first branch of the rule above laid down by Chief Justice SAWYER; viz., that if a stranger dealing with a corporation cannot see by an examination of the charter that the act proposed to be done is not necessarily beyond the powers of the corporation, it is valid.

Again, in *Bissell v. The Michigan Southern & Northern Indiana Railroad Companies*, 22 N. Y., 289, *ante*, Chap. III, Mr. Justice SHELDON observes: "This, then, is the true foundation of the defense we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act as a defense to a suit brought to enforce a contract which public policy forbids; viz., to discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable, not only in the hands of the original payee, but in those of any subsequent holder, because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

"The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

In the case supposed the question whether the contractor, seeking to recover on a contract, was the lowest bidder on a public improvement, would seem to be within the rule above laid down. That is, whether or not he was the lowest bidder is an extrinsic fact (as well, perhaps, as whether or not there had been notice of the letting given through the public journals), resting peculiarly within the knowledge of the corporate officers; and if so, would, on the general principle aforesaid, estop the corporation from denying that which, by assuming to make the contract, it had virtually affirmed.

The same ideas were expressed by Lord DENMAN in *Regina v. White*, 4 Ad. & El., N. S., 101. See, also, *Mayor of Norwich v. The Norfolk R. Co.*, 30 Eng.. L. & Eq., 120; *McGregor v. The Dover & Deal R. Co.*, 17 Jur., 21; 16 E. L. & Eq., 180; *Simpson v. Denison*, 10 Hare, 51.

In the case of negotiable instruments executed by corporations, either private or municipal, we have heretofore observed: If the corporation had authority to issue these instruments for any purpose, although in respect to the particular issue it may have been in excess of authority, the purchaser would be protected if he purchased the same in good faith for a valuable consideration and without notice, actual or constructive, of the particular informality or excess of authority on the part of the corporation or its agents.

If the corporation or its agents, having authority to issue its notes or bonds, either by the express provisions of law or its constating acts, or implied authority derived therefrom, such notes or bonds may still be issued for some unlawful purpose, and in that respect be considered *ultra vires*. But in the hands of an innocent holder, and especially, as we have seen, where the corporation has received the consideration therefor, they could not defeat the claims of the holder on the ground that they exceeded their authority in executing it. If there is nothing on the face of negotiable instruments executed by a corporation to indicate that they are *ultra vires*, and it had power to issue such instruments in the conducting of its legitimate business, a defense on that ground could not be set up to defeat a recovery thereon by a *bona fide* holder for value without notice of excess of authority in issuing them for the particular purpose for which they were issued. *City of Lexington v. Butler*, 14 Wall., 283; *ante*, Ch. II, Selected Cases and notes.

Mr. DILLON, in his work on Municipal Corporations (§ 108), observes: "In favor of *bona fide* holders of securities, the corporation may be estopped to avail itself of irregularities in the exercise of the power conferred, but it may always be shown that under no circumstances could the corporation lawfully make a contract of the character in question." See, also, Dill. on Munic. Corp., § 381; *Marsh v. Fulton Co.*, 10 Wall., 676; *Thomas v. Richmond*, 12 Id., 349; *Leavenworth v. Remkin*, 2 Kan., 358; *Martin v. Mayor*, 1 Hill, 345; *Buon v. Utica*, 2 Barb., 104; *Cornell v. Guilford*, 1 Den., 510; *Parsons v. Goshen*, 11 Pick., 396.

The second point determined in the case of *Zottman v. San Francisco* (1862); viz., that although the corporation had received the benefit of the work, it was not liable therefor, was also followed in *Hague v. The City of Philadelphia* (1865). This doctrine would also appear at variance with the current of authorities, as we have seen, where a private corporation has received the consideration. See *ante*, Chap. VIII, and notes; *White v. Franklin Bank*, 22 Pick., 181; *Leavit v. Palmer*, 3 Comst., 19; *State Board of Ag. v. Citizens' Street R. Co.*, 47 Ind., 407; *Steam Nav. Co. v. Weed*, 17 Barb., 378; *Bank v. Hammond*, 1 Rich. L., 281; *Southern, etc., Co. v. Lanier*, 5 Fla., 110; *Silver Lake Bank v. North*, 4 Johns. Ch., 370; *Potter v. Bank of Ithica*, 5 Hill, 490; *Sacket's Harbor Bank v. Lewis Co. Bank*, 11 Barb., 213; *Tracy v. Talmage*, 14 N. Y., 162.

But, whatever may be the true doctrine in cases where work and labor have been done under *ultra vires* contracts, it seems well settled that a party may recover back money paid under them. See, *post*, Chap. XI, and notes; *Paul v. Kenosha*, 22 Wis., 266; *Dill v. Wareham*, 7 Met., 438; *Piemental v. San Francisco*, 21 Cal., 351.

The doctrine of implied promise.—The doctrine of liability on an implied promise, in case the corporation has no power to contract, is, as we have seen, denied in the case of *Argenti v. San Francisco, supra*, and it is there held that no recovery can be had, except it be for money received or property appropriated under the contract.

In *Burrill v. Boston*, 2 Cliff. C. C., 590 (1867), CLIFFORD, J., observed: "The law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract." See, also, *The Collector v. Hubbard*, 12 Wall., 1 (1870); *Thomas v. Richmond*, 12 Id., 349 (1870); Dill. on Munic. Corp., §§ 383, 384, and notes.

This doctrine was applied in cases of appropriations of money to celebrate the fourth of July, and to commemorate the surrender of Cornwallis. *Hood v. Lynn*, 1 Allen, 103; *Task v. Adams*, 10 Cush., 252; *Stetson v. Kempton*, 13 Mass., 272; *Parsons v. Goshen*, 11 Pick., 396; *Willard v. Newburyport*, 12 Pick., 227; *Spalding v. Lowell*, 23 Pick., 71.

CHAPTER X.

WHEN THE CONSIDERATION MAY BE RECOVERED.

TWENTIETH SELECTED CASE.

Paul v. The City of Kenosha.*

1. Plaintiff purchased of a city its bonds, which were void for want of power in the city to issue them. *Held*, that he was entitled to recover the amount paid, as for a failure of the consideration.
2. It was not necessary for plaintiff to return, or offer to return, the void bonds.

Appeal from the Circuit Court of Kenosha county.

The plaintiff declared upon three $500 bonds of the city of Kenosha (numbered 3, 4 and 5), with coupons attached, alleged to have been made September 1, 1857, under Chap. 133, Pr. & L. Laws of 1857, signed by the mayor and clerk, and sealed with the seal of the city, payable to Josiah Bond or bearer, to aid the Kenosha & Rockford R. R. Co., in the construction of its road.

The complainant avers that in September, 1857, at defendant's request, plaintiff purchased of defendant said bonds and coupons, and, paid defendant $1,500 therefor, and defendant thereupon delivered them to him as good and valid bonds and coupons, and binding upon it and plaintiff, believing them to be such, received them as aforesaid, and now holds and owns them as his property. It is then alleged that defendant afterwards paid one year's interest on each of said bonds, by taking up

*Reported in 22 Wis., 266 (1867).

the two coupons on each first to be paid, but that other coupons, calling for $675, are past due and unpaid, and that payment has been demanded and refused, etc. It is further alleged that the money so paid to defendant, by plaintiff, was solicited and received by defendant solely for its legitimate and municipal purposes; that "defendant then and there asserted to plaintiff that said bonds were worth $500 each, and claimed to own and hold said bonds as its own municipal property, to aid in its municipal affairs, and plaintiff, then and there relying upon such assertion of defendant, advanced to said city the several sums of money above named;" that the money was placed in the treasury of the city with its other money and funds, kept and used for municipal purposes, and was wholly used for such purposes. There was another count in the nature of *indebitatus assumpsit* for $3,000, "for money by the plaintiff before that time paid, laid out and expended to and for the defendant's use and at its request, and for city scrip and city orders and promissory notes issued by the defendant, sold and delivered to defendant at its request, and for money had and received by defendant to and for the use of plaintiff, and for the use and interest of said several sums of money." In obedience to an order, the plaintiff served a bill of particulars, as follows: "The plaintiff, on or about the 3d of October, 1857, sold and delivered to defendant, at its request, city orders, sometimes called city scrip, issued and put in circulation by said city for the purpose of defraying its municipal expenses, to the amount and value of $881. * * Also, the plaintiff, on or about said 3d of October, 1857, at the request of the defendant, advanced to the defendant, for municipal purposes, money to the amount of $394. Plaintiff will also prove on the trial that defendant is indebted to him for the interest on the several sums hereinbefore stated, from said 3d of October, 1857."

The answer is substantially a general denial, with an allegation that the bonds above mentioned were issued and sold without authority of law, and had been fully paid and satisfied before they came into plaintiff's possession.

On the trial, the bonds and coupons declared on were put in evidence; defendant objecting, on the grounds that they

were not mentioned in the bill of particulars, and that they were issued and delivered to plaintiff without authority of law. They were dated September 21, 1857, signed by the plaintiff as mayor of the city, and countersigned by one West as city clerk. One Lewis, for the plaintiff, testified that he was defendant's clerk, and had been since 1858, and that he had examined its books and records to see whether there were any records relating to the sale and transfer of these bonds by the city, and did not find any such. One Hanson, for the plaintiff, testified that he was treasurer of the city of Kenosha from 1853 to 1859; that during 1857 the city issued its bonds for about $100,000 to the Kenosha & Rockford R. R. Co., to aid in the construction of its road; that they were issued in pursuance of a law and ordinance of said city, with the signatures of the mayor and clerk and the corporate seal; that they were all made payable to Josiah Bond or bearer, and all delivered to the Kenosha & Rockford R. R. Co. Witness further testified, against objection, that the city afterwards became owner of five of the bonds for $500 each, numbered 1 to 5; that he (witness) as city treasurer, by defendant's direction, disposed of said five bonds, three of which he sold to plaintiff in the latter part of 1857; that it was his impression that plaintiff paid him 80 to 85 cents on the dollar, $175 in the coupons attached to said bonds, and the balance in money and current scrip, issued by the city for municipal purposes; that said scrip was canceled to witness' credit, like other city scrip, on his settlement with the city, and the money was used by the city as a part of its general funds. Witness further testified that the city had neglected to make provision for payment of the interest on its bonds, and that plaintiff had called upon him once or twice to see whether such provision had been made. On cross-examination, the witness testified that it was his impression that in consideration of the city allowing the coupons which were partly matured to remain on the bonds [when they were issued to the railroad company], and assuming the payment of certain interest, the five bonds above mentioned were returned to the city, which received them of the company at eighty cents on the dollar; that it was his impression that the authority given him by the city council

to sell said bonds was a matter of record in the city clerk's office, and was a resolution of the common council acting as such, passed in October or December, 1857; that plaintiff did not pay more than $300 in money, and witness thought from $200 to $300; that some of the scrip delivered to him by plaintiff for the bonds was of the recent issue, and none of it more than a year old; that a certain sum was allowed the mayor for services in executing the bonds, and witness was not sure that scrip was issued therefor, but had embraced the amount in his statement as to the amount of scrip delivered to him by plaintiff; that he thought the mayor, as such, was not at the time entitled to any salary; that the five bonds above mentioned, when they came back to the city, were surrendered or delivered to him (witness), and he gave a receipt for them to the railroad company; that he could not refer to any act or resolution of the common council from which he obtained the impression that the bonds were sold to plaintiff to procure means for municipal purposes. On redirect examination, witness stated that the sum allowed plaintiff as mayor for special services in executing the bonds was $100; that it was allowed by the railroad company, and paid by it to the city in this transaction [the return of the bonds to the city]. It appeared further that plaintiff was mayor of said city from the spring of 1857 to the spring of 1859.

The court found that defendant executed and delivered the three bonds in question, and the coupons along with other bonds, to the Kenosha & Rockford R. R. Co., in September, 1857; that said company, in payment for interest which had accrued on said bonds when so delivered, and of certain expenses which had been incurred by the city in and about the execution of the same (including $100 allowed plaintiff as mayor), redelivered to defendant five bonds of $500 each, and coupons, three of which were the bonds described in the complaint; that defendant sold to plaintiff the three bonds last above mentioned, with coupons, in the latter part of 1857, at 80 cents on the dollar, or for $1,200; that plaintiff paid therefor $175 in coupons attached to said bonds, and the balance in cash and city scrip; that the cash so paid (from $200 to $300) was placed in defendant's treasury and used for ordinary municipal

purposes, and the scrip had theretofore been issued for ordinary municipal purposes, except $100 of it, which had been issued to plaintiff for signing bonds as aforesaid. As conclusions of law the court held that said three bonds and the coupons attached were null and void, and of no value whatever; that the scrip issued to plaintiff for signing bonds was also void; that the plaintiff was entitled to judgment for the sum paid by him for the bonds, less said two amounts of $175 and $100, *i. e.*, for $926, with interest, etc. Judgment accordingly, from which the defendant, after excepting to the several findings of fact and conclusions of law, appealed.

COLE, J.—Under the circumstances, we consider the objection that the plaintiff could not recover the consideration paid for the city bonds, without offering to return them to the city, as untenable. The suit was against the city which issued the bonds, and the bonds were put in evidence and declared void and of no value whatever by the circuit court. What further purpose or use can the bonds be put to? They are canceled. We are really at a loss to imagine what earthly benefit the possession of the bonds would be to the city. Perhaps if the city had asked that the bonds be delivered over to its possession after the court had held them to be null and void, the court might have so ordered; although it would seem to be an idle act. But no request of the kind was made, and we cannot see how the city can possibly be prejudiced by the bonds remaining with the record and papers in the cause. The court held that the plaintiff was entitled to a judgment for the amount paid for the bonds less the $175 paid in coupons, and the $100 paid in city scrip, which was allowed the plaintiff for signing the bonds. In other words, the plaintiff was permitted to recover the amount of money and scrip which had been issued for municipal purposes, and which had been paid the city by him for bonds which were of no value. What valid objection can there be to a judgment against the city to that extent? The city has had that amount of money and legal scrip for its city bonds, which turn out to be of no value whatever. It seems to fall under the general rule of law that where a party sells an obligation which turns out to be valueless and not of

such a character as he represents it to be, he is liable to the vendee as upon a failure of consideration. The city bonds, it appears, were void when the agents of the city sold them to the plaintiff. Is it just and equitable that the city retain the money which it has received for its own worthless bonds? The plaintiff took the bonds upon the presumption that they were valid securities, and paid his money, or its equivalent, to the city for them. They turn out to be void for want of power on the part of the city to issue them, and he seeks to recover back the money paid as upon a failure of consideration. Can he not recover the amount he has paid the maker of the bonds for its worthless paper? It seems to us unnecessary to go into the authorities upon the question. The principle has been fully discussed in *Hurd v. Hall*, 12 Wis., 112; *Lawton v. Howe*, 14 Id., 241; *Costigan v. Hawkins* (*ante*, p. 74). Upon the ground, therefore, that the amount recovered was paid upon a consideration which has failed, we think the judgment right.

By the court.—The judgment of the circuit court is

AFFIRMED.

WHEN THE CONSIDERATION PAID MAY BE RECOVERED.

TWENTY-FIRST SELECTED CASE.

PIMENTAL ET AL. v. THE CITY OF SAN FRANCISCO.*

The several cases which have been before this court in relation to the liability of the city of San Francisco to the parties who bid off the city slip property at the attempted sale by the city authorities in December, 1853, under an alleged ordinance, designated as Ordinance No. 481, commented upon and held to have decided and settled the following points:

First. That the ordinance so-called was never passed, and was, therefore, a nullity.

Second. That the sale made in pursuance of it was, therefore, invalid and passed no title to the bidders.

*Reported in 21 Cal., 352 (1863).

Third. That the bidders were entitled to recover back from the city the purchase-money paid by them, and received and appropriated by the city authorities.

Fourth. That they were not precluded from a recovery either: 1st, by reason of any want of privity between themselves and the city; or 2d, by the alleged subsequent adoption by the city authorities of the ordinance directing the sale; or 3d, by reason of a subsequent alleged ratification of the sale by an appropriation of the proceeds; or 4th, by the clause in the city charter restraining the corporation from contracting liabilities beyond the sum of $50,000; or 5th, by the act of the legislature of 1858, authorizing the city treasurer to execute deeds to the purchasers on certain conditions.

Claims against the city of San Francisco by the bidders, at the attempted sale in December, 1853, for the purchase-money paid on such sale, are within the fourth subdivision of the seventeenth section of the limitation act, and are barred by a failure to sue within two years from the date of the receipt of the money by the city. The filing of a complaint in the proper court, without the issuance of a summons thereon, is the commencement of an action within the terms and meaning of the limitation act, and stops the running of the statute.

The complaint in an action to recover back from the city of San Francisco purchase-money paid upon the invalid sale of her city slip property in 1853, was filed April 21, 1856, and alleged that one installment of the purchase-money was paid December 27, 1853, another February 27, 1854, and a third, April 27, 1854, and that these several payments were received by the city on the respective days of their payment. The referee to whom the case was referred found as a fact that the several payments were made to the city and accepted by her as alleged in the complaint. *Held*, that the defense of the statute of limitations pleaded by the cites must be sustained as to the first two installments, and disallowed as to the third.

Appeal from the Fourth Judicial District.

THIS is an action to recover the sum of $7,900, alleged to have been received from the plaintiff by the city of San Francisco upon an alleged sale of a parcel of certain property known as the city slip property, situated within the limits of the said city—$1,975 on the twenty-seventh day of December, 1853; $3,950 on the twenty-seventh day of February, 1854; and $1,975 on the twenty-seventh day of April, 1854. The complaint was filed on the twenty-first of April, 1856, and the summons was issued on the twenty-fourth of December, 1860. The facts of the case are sufficiently stated in the opinion of the court. A more detailed statement of the facts relating to

said alleged sale are found in the report of the case of *McCracken v. The City of San Francisco* (16 Cal., 591), and in the report of the case of *Grogan v. The City of San Francisco* (18 Id., 590).

In the present case the plaintiff had judgment, and the defendant appeals.

FIELD, C. J., delivered the opinion of the court; COPE, J., and NORTON, J., concurring.

This is one of the numerous cases which have grown out of the attempted sale by the authorities of the city of San Francisco, in December, 1853, of the property known as the city slip property. The general facts in all of them upon which the liability of the city is asserted, lie within a narrow compass; but the defenses interposed have varied with the different cases, and have not always been consistent with each other. In some of the cases the entire transactions giving rise to or connected with the alleged sale, including the receipt and appropriation of the moneys derived therefrom, have been treated as transactions to which the city was an entire stranger; in other words, a want of privity between the bidders and the city has been asserted. In other of the cases, a subsequent adoption of the ordinance directing the sale has been alleged, and a ratification of the sale by the appropriation of its proceeds. In some the restraining clause of the charter against the incurring of liabilities has been relied upon, and in others, as in the present case, the length of time in which the claim against the city has existed, is set up as a bar to its recovery. In the meantime the indebtedness against the city, if obligatory at all as such, has been increasing at a rapid rate by the accumulation of interest, and the heavy expenses of protracted litigation, until the amount at present exceeds, it is believed, a million of dollars. It is desirable, therefore, not only for the claimants, but for the city, that the controversy between them should be brought to a termination. It may be well, therefore, before proceeding to consider the question immediately arising in the case at bar to briefly state the different positions already considered and settled by this court.

The facts out of which the litigation has arisen are briefly these: On the fifth of December, 1853, the mayor of San Francisco approved of what purported to be an ordinance passed by the common council of the city, providing for the sale of the city slip property. This ordinance, so-called, in terms authorized and required the mayor and joint committee on land claims to sell the property at public auction after certain days advertisement, and provided that twenty-five per cent of the purchase-money should be paid on the day of sale, fifty per cent in sixty days thereafter, and the balance in four months. At the time this ordinance was acted upon by the board of assistant aldermen there was a vacancy in the board, occasioned by the resignation of one of its members, so that of the eight members elected only seven remained in office. Of this number four members voted for the passage of the ordinance and three against it. As a consequence, the ordinance was not passed, not having received the necessary vote required by the charter then in force. The charter vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each board to be composed of eight members, and fixed the limits of their authority. It empowered them to pass all "proper and necessary laws" for the sale of the city property—that is, all proper and necessary ordinances for that purpose, for "laws" and "ordinances," when applied to the acts of municipal corporations, are synonymous terms. But it is declared that no ordinance should be passed "unless by a majority of all the members elected to each board."

The ordinance in question, therefore, not having received the vote of a majority of all the members elected, was never passed. It was, in fact, rejected—as much so as if every member had cast his vote against its passage. It was, therefore, for all purposes an absolute nullity. The board, however, declared it passed, and it received, as we have stated, the approval of the mayor, and was published as a valid ordinance of the city. It is designated in the official book of the city ordinances as Ordinance No. 481. Treating it as a valid ordinance, and assuming to act under its provisions, the mayor and land committees, on the twenty-sixth day

of December, 1853, put the property up for sale at auction, and struck it off in parcels to different parties. A portion of the purchase-money was paid by the bidders at the time, or within a few days afterward, and another portion, or the entire balance, within the the following year. In the present case the plaintiffs bid off one of the parcels for $7,900, and paid the first installment, one-fourth thereof, on the day following the sale; the second installment, one-half thereof, in February, and the balance in April, 1854. For the amounts paid by the respective bidders, whatever they were, the several actions against the city were brought.

The moneys paid by the bidders went into the treasury of the city, and were afterward by different ordinances and resolutions appropriated to municipal purposes. To the different actions, as we have mentioned, various defenses have been interposed. In some of them, as already stated, the entire transactions giving rise to or connected with the alleged sale have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity, as it is termed, between the bidders and the city has been alleged.

This alleged want of privity, as we understand it, amounts to this: That inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the case go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys, or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it from this general obligation. If she obtain other property which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor from the like obligation. (*Argenti v. The*

City of San Francisco, 16 Cal., 282.) And legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any right to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice. In the first case which came before this court, *Holland v. The City of San Francisco*, the doctrine of a want of privity was announced. Had this doctrine prevailed, the purchasers would have lost both the property and their money, while the city would have retained both. This result was so manifestly unjust that a rehearing was granted without hesitation; and on re-argument the position was considered so unsound that it was not noticed by counsel. Mr. Chief Justice MURRAY, alluding to it, said: "It will hardly be necessary to adduce any argument to establish the proposition that the former opinion of this court was erroneous. A mere reference to it is sufficient, and the point on which it was predicated seems to have been abandoned by the unanimous consent of the court and counsel." (7 Cal., 338.)

In some of the actions the subsequent adoption of the ordinance directing the sale of the slip property has been alleged, as a defense by the city. In *Holland v. San Francisco* this court held, Justices BURNETT and TERRY rendering the decision, Chief Justice MURRAY dissenting, that an ordinance which was passed within an hour previous to the sale, and which referred to the ordinance directing the sale, and appropriated a portion of its anticipated proceeds, did, in fact, by such reference and appropriation, recognize and adopt the first ordinance, so as to render the subsequent sale valid and binding upon all parties. This decision was overruled in *McCracken v. The City of San Francisco*, as it was too palpably unsound to stand the test of the slightest investigation. Indeed, we have never yet met with any lawyer who had the hardihood to attempt its justification. The reference in the second ordinance, independent of the appropriation it makes to the previous ordinance, did not add anything to the validity of that ordinance. There is no efficacy in the mere reference to previous legislation, whether valid or invalid. Nor did the

appropriation designated in the second ordinance operate as an adoption of the previous ordinance. An ordinance cannot in this way be passed; it can only be passed in one way—by a majority of both boards of the common council voting for it. The doctrine asserted in the decision, as we said in the McCracken case, "is unsound in principle and is unsupported by any authority; and could it be maintained would break down and destroy all the checks imposed by the legislature upon the exercise of the powers of the common council. Upon this doctrine that body could at any time adopt the unauthorized acts of others—in the levy of taxes, in the sale of public property, in the opening of streets, in the infliction of penalties, and by admitting in one ordinance that it had previously passed an ordinance for those purposes, give validity to those acts."

The subsequent ratification of the sale by the appropriation of its proceeds has also been alleged as a defense. But this appropriation did not operate, as we held in the McCracken case, as a ratification any more than the appropriation of moneys received from an illegal assessment would have operated to give validity to such assessment. The ordinances and resolutions making the appropriation did not purport to ratify the sale, but proceeded upon its assumed validity. But in addition to this, as we said in *Grogan v. San Francisco* (18 Cal., 608), "all sales of the city property were required to be made at public auction. This mode was essential to the validity of any sale. A ratification of an illegal public sale is in effect making a private one. The object of the ratification is to vest in the purchaser the title, as he had acquired none previously, and for that purpose to confirm the sale at the prices already offered—that is, to make a sale upon the consideration of the original bid. At public auction this could not be done, for the very essence of an auction sale is, that everyone is at liberty to bid, and that the property shall fall to the highest bidder. It could only be done by a private arrangement, and as a consequence could not be done at all by the common council under the restrictions of the charter. The case would be different if the common council had possessed authority to dispose of the municipal property at pri-

vate sale. They could then have said: We will confirm the previous proceedings; we will take the money already advanced, and what is to be advanced upon the bid as a consideration, and transfer the title. But as the power of disposition could only be exercised in one way—by a direct ordinance authorizing a public sale, after due advertisement of the time, place and terms—no other mode could be adopted in its stead. Appropriation of the proceeds, proceedings upon the assumed validity of the sale, reference to the ordinance as having been passed, would not answer the requirements of the charter. The common council were not invested with any discretion to substitute a different mode for the disposition of the city's property in the place of the one provided."

In some of the actions against the city, the restraining clause of the charter of 1851 against the incurred debts or liabilities exceeding in the aggregate, with former debts or liabilities, the sum of fifty thousand dollars, has been relied upon. This clause was the subject of extended consideration in the McCracken case, and we held that it referred to the acts or contracts of the city, and not to liabilities which the law cast upon her; that it was intended to restrain extravagant expenditures of the public moneys, and not to justify the detention of the property of her citizens, which she had obtained without authority of law. Her liability in this respect, we said, was independent of the restraining clause; "and it may be well doubted," we continued, "whether it would be competent for the legislature to exempt the city, any more than private individuals, from liability under circumstances of this character. Suppose, for example, that the city should recover judgment against an individual for $100,000, and collect the money upon execution, and upon appeal the judgment should be reversed, would it be pretended that the money could not afterwards be recovered? Could the city defend against the claim for restitution upon the pretense that she was already indebted over $50,000? Could she, to use the language of counsel, *owe herself out of liability?* Suppose, again, an individual should pay the taxes upon his property, in ignorance that they had already been paid by his agent, could the city retain the amount thus paid by mistake? Could she plead

her previous indebtedness as an excuse for the detention of the money to which she had no legal or equitable right? Suppose, again, the city should neglect to keep the streets in repair, and an individual should be injured in consequence—should break his leg, or be otherwise crippled—could she allege her insolvency against his claim for damages? Would her pecuniary condition be an answer for the neglect of every duty, legal and moral? If this were so, she would be the most irresponsible corporation on earth, and her treasury would be, in many instances, but a receptacle for others' property, without possibility of restitution. The truth is, there is no such exemption from liability on her part. The same obligations to do justice rest upon her as rest upon individuals. She cannot appropriate to her own use the property of others, and screen herself from responsibility upon any pretense of excessive indebtedness."

As will be seen from this brief statement of the questions settled in the several cases heretofore before the court, there is nothing to prevent a recovery of the claimants in the alleged want of privity between the bidders and the city, or in the alleged subsequent adoption of the ordinance providing for the sale, or in the alleged ratification of the sale, or in the restraining clause of the charter. The several cases stand simply upon this ground: The city has obtained the money of her citizens without any consideration, under a mistaken impression of her rights, and has appropriated it to municipal purposes; and they insist, and so we have held, that she is, under these circumstances, bound, both legally and morally, to refund it to them.

The suggestion, frequently made in the cases, that the claimants are taking advantage of a mere technical defect, and that had they remained contented with the sale they would not have been disturbed in their possession, is without force. That defect which vitiates entirely a sale and leaves the title of the property in the city, can hardly be termed a technical one. It is a defect which goes to the substance of the whole transaction. Nor is it by any means certain that the bidders would have been left in undisturbed possession of the property had no question as to the validity of the alleged sale been raised.

They could have no assurance that subsequent corporate authorities might not claim the property; or if the authorities did not move in the matter, that the creditors of the city might not attempt to subject the property to the satisfaction of their demands. But, independently of these considerations, it is enough to say that the bidders had a clear right to ask for a return of their money when they found that the title had not passed to them and could not pass by the proceedings taken. They were not under any obligations to wait a moment. The money was paid for a present, not a future transfer of the title. But the bidders were more indulgent than this. It appears from the findings in one of the actions (*Grogan v. San Francisco*, 18 Cal., 587) that in January, 1855, they became aware of the invalidity of the sale and apprised the then common council of the city of its invalidity, and requested them to pass an ordinance ratifying and confirming the sale, which they refused to do. It is true that the common council did not possess the power to ratify and confirm the sale, but they could have applied to the legislature then in session for the power. No steps of the kind were, however, taken. There was only one alternative left to the bidders—to institute suits for the recovery of their money, which they subsequently did. Again, in 1858, the legislature passed an act authorizing the treasurer of the city to execute deeds to the purchasers upon receiving the balance, if any remained unpaid, of the original bids; and provided that such deeds should convey the right, title and interest, both of the city and of the city and county, in the property. But this act the city neglected to accept, and without her acceptance it never acquired any force or efficacy whatever. It undertook to divest the city of her property upon conditions imposed by the legislature, and not by herself. The conveyances of the treasurer under the act were, therefore, inoperative to pass any interest, and the title to the property remained as before in the corporation. (*Grogan v. San Francisco*, 18 Cal., 590).

In the present case the city sets up as a bar to the plaintiffs' recovery the statute of limitations. With the policy of a defense of this character on the part of the city we have nothing to do. The defense is a legal one and our duty ends with a

determination whether or not it has been sustained. The action is for the recovery of $7,900, paid upon the alleged sale of one of the parcels of slip property. The complaint alleges that $1,975 were paid on the twenty-seventh of December, 1853; $3,950 on the twenty-seventh of February, 1854; and the balance, $1,975, on the twenty-seventh of April, 1854; and that these several sums were received by the city on the respective days of their payment. The referee finds that the several payments were made to the city and accepted by her as alleged in the complaint. In the other actions which have been before this court growing out of the alleged sale, it has appeared that the moneys were in the first instance paid to the mayor and land committee, and by them paid into the treasury of the city, on or about the twenty-eighth of April, 1854. The payment at this date does not appear to have been proven in this case. The defense is, therefore, sustained as to the first two installments and is not sustained as to the third. The complaint was filed on the twenty-first of April, 1856, more than two years after the payment of the first two sums, and within two years after the payment of the last sum. The statute was a bar after two years from the receipt of the money by the city. Whether that receipt must be evidenced by a refusal to refund the moneys, or their appropriation to municipal purposes, it is not necessary to express any opinion. The allegation and the finding are both that they were received by the city at the several dates designated.

The position that the filing of the complaint, without the issuance of summons thereon, did not prevent the statute running, is not tenable. At common law there was no limitation to the period within which actions could be commenced, though a presumption was created that the claim was satisfied by the lapse of twenty years. It is the statute which prescribes the limitation, and in this State the same statute declares that an action shall be deemed commenced, within its meaning, "when the complaint has been filed in the proper court." It was certainly within the legislative power to affix this qualification upon the provisions of the statute, though grave considerations as to its policy may be presented, as they

have been by the learned counsel of the appellant in the present case. (*Sharp v. Maguire*, 19 Cal., 597).

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

WHEN THE MONEY ADVANCED MAY BE RECOVERED BACK.

TWENTY-SECOND SELECTED CASE.

DILL ET AL. V. INHABITANTS OF WAREHAM.*

A town, in its corporate capacity, has no authority to transfer the right of taking oysters within its limits, and any contract made by a town for that purpose is void.

Where a party receives money in advance, on a contract which he had no authority to make, and afterwards refuses to fulfill the contract, the other party may recover back the money, in an action for money had and received. In such case no previous demand of the money need be averred or proved.

ASSUMPSIT on an agreement set forth. There was also a general indebitatus count for money had and received. The count on said agreement, after stating the contents thereof, averred that the plaintiffs had kept and performed their part of it, in all respects, and that the same had not been lawfully terminated; "yet, although the defendants, for a time, also performed their part of said agreement and furnished the permits required by law to authorize and protect the plaintiffs in fishing for and taking oysters pursuant to said agreement, they afterward violated their said agreement and utterly refused to grant to said plaintiffs the necessary permits to authorize and protect them in fishing for and taking oysters under said agreement, and forbade the plaintiffs from taking the same, contrary to the true intent and meaning of said agreement, and have permitted other persons to take the same; whereby the plaintiffs have been put to great expense for vessels and men employed for the purpose, and have lost the profits secured to

*Reported in 7 Met. (Mass.), 438 (1844).

them by said agreement," etc. Plea, general issue, with a specification of defense.

At the trial before WILDE, J., the plaintiffs, to maintain the issue on their part, produced a copy of a vote passed by the defendants at a meeting held on the 17th of July, 1837, agreeing "to dispose of such portion of the oysters in the waters of said town, as may be thought advisable by a committee to be appointed to have a superintendence of the subject;" a copy of a vote, passed at the same meeting, that the four persons who signed the agreement declared on by the plaintiffs, with Joshua B. Tobey, be a committee "to obtain such information as is necessary, and be empowered to make sale of such quantities of the oysters belonging to the town as they may think for the interest of its citizens, or for such time not exceeding ten years, giving a preference to the inhabitants of the town, in the sale thereof;" and the agreement declared on, the execution of which was admitted by the defendants.

To support the count for money had and received, the plaintiffs gave in evidence a receipt signed by the defendants' treasurer, dated February 29, 1840, for $500, paid him by the plaintiffs, "which they were to deposit in the hands of the treasurer as a security for the payment for the oysters which they may take the ensuing year."

To show a breach of said agreement by the defendants, the plaintiffs read (among other papers) the following vote, passed at a meeting of the defendants, held on the 8th of September 1838: "*Voted*, that the selectmen be hereby advised to grant no more permits for taking of oysters from any beds in the town of Wareham, until the whole legal controversy, with which the town is threatened on account of the appropriation of the oyster money, be finally settled; and that the selectmen inform the gentlemen who took the oysters last season, that they must consider their contract (if any they have) at an end; and if any damage shall accrue to said gentlemen on account of boats or apparatus, that the selectmen settle with them fairly and honorably, by allowing them a fair price for their boats, etc., or otherwise, as in their judgment the honor of the town shall require." Also the following

votes of the defendants, passed on the 11th of March, 1839: "*Voted*, that the town give nine months' notice, to the men who bought the oysters, that the contract must cease after this year. *Voted*, that the selectmen, together with [four men named] be a committe of the town to notify Joshua A. Dill and his associates, that their contract with the town for taking oysters must cease after this year." The plaintiffs likewise gave evidence, that on the 29th of May, 1839, they were duly served with notice of these last mentioned votes.

The plaintiffs then showed that they sent a vessel to Wareham, in the spring of 1840, for the purpose of obtaining oysters under their contract, as they had done in preceding years; that their agents applied, as formerly, to the chairman of the selectmen for the statute permit which had previously been given, and was refused; that the vessel, after wating a number of days, during which some town meetings were held, returned empty, and that no oysters had since been taken by the plaintiffs.

There was much evidence tending to show that there were, in said town, oysters to which the plaintiffs were entitled by the terms of said contract, and which might have been taken without injury to the fishery. There was also much evidence tending to prove the contrary.

It was insisted by the defendants, and they requested the court to instruct the jury, that the town, in its corporate capacity, had no authority to make the contract declared on, or to bind the town by any contract for the taking of oysters by the plaintiffs; that the town had made no such contract with the plaintiffs, as was set forth in the plaintiffs' declaration; that the town had done no act to deprive the plaintiffs of the benefit of said contract, and that the plaintiffs had not proved any breach of said contract by the defendants; that the damages for the breach of said contract would not embrace the whole unexpired term of it; and that the evidence respecting the $500 was not sufficient to justify the jury in returning a verdict for the plaintiffs for that amount.

The court declined to give the instructions requested, and charged the jury that the contract adduced in evidence supported the plaintiffs' declaration, and was a legal and valid

contract, obligatory on the defendants; that if there had been a breach of said contract by the defendants the plaintiffs were entitled to recover, in this action, the damages which they had sustained by reason of the non-fulfillment thereof, including therein the unexpired term of the said contract; that the votes of said town, of the 11th of March, 1839, if notified to the plaintiffs, as the evidence tended to prove, was a breach of said contract, provided there were oysters in said town which the paintiffs, by said contract, were entitled to take and could have taken without injury to the oyster fishery in said town and to the inhabitants thereof; that the plaintiffs were bound by the contract to make such use only of the oyster beds as would leave the inhabitants of the town fish enough for their own reasonable consumption, and not injure the fishery as a property; and that, if the plaintiffs' fishing had in fact proved injurious in these respects, the defendants had lawfully terminated the contract, and had not broken it. The court also instructed the jury that the plaintiffs, on the evidence, were entitle to recover the $500.

A verdict was returned for the plaintiffs for $4,560.42, which was to be set aside and a new trial granted if the foregoing rulings and instructions were erroneous; otherwise, judgment to be rendered upon the verdict.

This case was fully argued on all points raised at the trial. But the argument raised on those points which the court did not decide, is not here given.

SHAW, C. J.—Many questions were raised and discussed in the argument of the present case which the court have not found it necessary to decide. It is an action against the inhabitants of the town of Wareham, on a special executory contract, and the claim is to recover damages for the breach of it. If the contract on which the action is brought be held to grant any interest or property in the oyster fishery, or any franchise or vested right whatever which has been invaded, the remedy of the plaintiffs must be sought in an action on the case for disturbance, or by other appropriate proceedings, and against those who caused the disturbance. It is proper, therefore, to repeat that this is an action on the contract, as an ex-

ecutory contract, and a non-fulfillment thereof on the part of the town, in which the plaintiffs seek to recover damages for the loss sustained by such non-fulfillment.

One ground of defense was, that if this instrument, which is extremely guarded and cautious, contained any stipulation that the town should perform any act, it was not averred or proved that the town have failed or refused to do such act, and so there was no such breach or non-fulfillment as would enable the plaintiffs to maintain this action. This agreement on the part of the town is certainly much more in the nature of a grant, lease, or release of right, or other executed contract, than an executory undertaking to do any act; and such stipulation, if found at all in it, must arise from implication and as something incident to a benefit or right granted, and not in terms. But if the town had no interest or property in the subject, and no legal authority, as a corporation of very limited powers, to make such an executory contract, then the vote passed by the inhabitants, purporting to vest power in a committee, was unauthorized and void, and the undertaking of the committee, professing to bind the town, was merely void. This is the first question; and if it appears that the contract was not the binding contract of the town, it becomes unnecessary to consider another question which was largely discussed; namely, whether there was any such implied stipulation, what was its legal effect and operation, and whether any violation of it had been averred and proved.

By the common law of England, the property of the coasts, bays, and arms of the sea, and of the fishery therein, was in the king; but in trust, as to fisheries, for all the king's subjects, except when otherwise especially granted; so that in effect such fisheries were regarded as common to all the king's subjects. 9 Petersd. Ab. (Amer. Ed.), 451, 452. By the colony charters, this right of the crown was transferred, with the territory and jurisdiction, to the colonies, for the use and benefit of the inhabitants. This vested the power in the colonial governments to make laws to regulate and protect this, as one of the common rights of the inhabitants. It is not necessary to examine all the acts upon this subject. None can be found which vests an exclusive right of the property in the

oyster fisheries in towns, in their corporate capacities. If there had been, no further regulation would have been necessary; because the laws which secure all other rights of property would have been sufficient to enable towns to manage and defend such fisheries. In one case it has been decided that the town had no such property in the shad and alewife fisheries. *Randolph v. Braintree*, 4 Mass., 315.

Still the laws recognize some rights of the inhabitants of towns; as the celebrated colony ordinance of 1641 (Anc. Chart., 148), which secured free fishing and fowling, but limited the privileges thereby secured to householders, and to such free fishing and fowling within the limits of their respective townships. Such regulations obviously gave the privilege, rather to the inhabitants of townships, personally and respectively, than to the town in its corporate capacity; and rather as a common privilege, than as a right of property. It was also under this limitation; "unless the freemen of the same town, or the general court, have otherwise appropriated them." This, therefore, the earliest act on the subject, recognizes the right of fishing as a common right, and the authority of the colonial government to regulate it. And this was regulated by the provincial acts mentioned in the fifth section of *St.* 1795, c. 71. These acts were revised and repealed by the last mentioned statute. The preamble to this statute recites, that "oysters and other shell fish have long been considered the property of the towns;" but the same preamble speaks of them as "common property," which requires some further special provisions. And the statute proceeds to make regulations, which secure a right to all the inhabitants severally, and vests in the selectmen certain powers of granting permits. By this act, taking all its parts together, we are of opinion that whatever right vested in inhabitants of towns was a qualified right, and subject to be regulated by the general court; and that the whole subject was thereby regulated, and nothing remained for towns, in their corporate capacity, to do.

The same provisions were re-enacted by Rev. Sts. c. 55, §§ 11, 12. They are, that the selectmen "may give permits in writing to any person to take oysters from their beds at such times, in such quantities, and for such uses, as the said

selectmen shall think reasonable, and shall express in their said permits; and every inhabitant, without such permit, may take oysters for the use of his family." And all persons are prohibited from taking oysters otherwise, under a penalty.

Whether under these statute provisions the selectmen have authority to take money or valuable consideration for permits, or, in other words, to sell the right to take oysters; or, if they have such power and exercise it, whether they are not to be regarded as trustees for the town, and bound to account to the town for the proceeds, it is not necessary to decide in this case, and we give no opinion.

But the court are of opinion that the selectmen, in giving permits under the authority thus conferred on them are not the agents of the town, subject to be directed, restrained or controlled by its votes. They act under an authority conferred on them by statute, to be executed according to their own judgment, and do not act ministerially, according to the will of the town, expressed by its votes. It is like the authority given to selectmen by other statutes to lay out town ways; under which it has been held that a vote of the town directing them to lay out a particular town way described, is irregular and void. *Kean v. Stetson*, 5 Pick., 492.

We are, therefore, of opinion that whatever right the inhabitants of towns have to the oysters in their natural beds within their limits, beyond the right of the inhabitants severally to take them for the use of their families, is not an absolute property or franchise, capable of being transferred to others by the town, in its corporate capacity, but is a qualified right to be sought through the selectmen executing a statute power; that such a transfer of the fishery and the power of making contracts respecting it is not within the jurisdiction of towns, nor one of the corporate powers conferred on them by law. The supposed contract, therefore, upon which this action is brought, was one which the town of Wareham had no authority, as a corporation, to make and the town is not bound by it.

In regard to the sum of five hundred dollars, as it appears that it was received by the treasurer and went to the use of the town and was so received in advance, upon a consideration

which has failed, it must be regarded as money had and received by the town to the plaintiffs' use, and, therefore, the action for that sum will lie. No special demand was necessary. Where there is a debt, a duty to pay money presently, not dependent upon any condition or contingency, an action may be brought to recover it, without a previous demand.

If the defendants would have avoided the inconvenience of having the suit on the other points conducted at their expense, and of having to pay the costs, in consequence of their liability for this sum of five hundred dollars, they should have brought the money into court at the commencement of the suit, when a small amount of costs had accrued.

With the plaintiffs' consent the verdict may be amended to stand as a verdict for $500, with interest from the date of the writ, and judgment may be entered upon it; otherwise, the verdict is to be set aside and a new trial granted.

MUNICIPAL BONDS PAYABLE TO ORDER—DOCTRINE OF ULTRA VIRES APPLIED TO.

TWENTY-THIRD SELECTED CASE.

GELPCKE ET AL. v. THE CITY OF DUBUQUE.*

1. By a series of decisions of the Supreme Court of Iowa, prior to that, A. D. 1859, in *The State of Iowa, ex relatione, v. The County of Wapello*, 13 Iowa, 388, the right of the legislature of that State to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, was settled in favor of the right; and those decisions, meeting with the approbation of this court, and being in harmony with the adjudication of sixteen States of the Union, will be regarded as a true interpretaton of the constitution and laws of the State so far as relates to bonds issued and put upon the market during the time that those decisions were in force. The fact that the Supreme Court of Iowa *now* holds that those decisions were erroneous, and ought not to have been made, and that the legislature of the State had no such power, as former courts decided that they had, can have no effect upon transactions in the past, however it may affect those in the future.

* Reported in 1 Wall., 175 (1863).

2. Although it is in the practice of this court to follow the latest settled adjudications of the State courts giving constructions to the laws and constitutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law.
3. Municipal bonds, with coupons payable to "bearer," having, by universal usage and consent, all the qualities of commercial paper, a party recovering on the coupons will be entitled to the amount of them, with interest and exchange at the place where, by their terms, they were made payable.

THE constitution of the State of Iowa, adopted in 1846, contains the following provisions; to-wit.,

"Art. 1, § 6. All laws of a general nature shall have a uniform operation."

"Art. 3, § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated the General Assembly of the State of Iowa." etc.

"Art. 7. The *General Assembly* shall not *in any manner create any debt* or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed the sum of *one hundred thousand dollars*, except in case of war, to repel invasion, or suppress insurrection."

"Art. 8, § 2. Corporations *shall not be created in this State by special laws, except for political or municipal purposes;* but the General Assembly shall provide, by *general laws*, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. *The State shall not, directly or indirectly, become a stockholder in any corporation.*"

With these constitutional provisions in existence and force, the legislature passed certain statutes. One, incorporating the city of Dubuque, passed February 24, 1847, provided in its twenty-seventh section as follows:

"That *whenever*, in the *opinion of the city council*, it is expedient to *borrow money* for any particular purpose, the question shall be submitted to the citizens of Dubuque, the

nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes; the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

By an act passed January 8, 1851, this charter was "so amended as to empower the city council to levy annually a special tax to pay interest on such loans as are authorized by the twenty-seventh section of said act;" that is to say, by the section just quoted. A subsequent act, one passed 28th January, 1857, enacts thus:

"The *city of Dubuque* is hereby *authorized and empowered* to aid in the construction of the *Dubuque Western*, and Dubuque, St. Peter's and St. Paul Railroad companies, *by issuing* $250,000 *of city bonds to each*, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. *Said bonds shall be legal and valid*, and the city council is authorized *and required* to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, *bonds issued, or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the moneys arising from the sale of said bonds, without the limits of the city and county of Dubuque*, in the construction of either of said roads; and neither the city of Dubuque *nor any of the citizens shall ever be allowed to plead that the said bonds are invalid.*"

With this constitution, as already mentioned, in force, and after the incorporation of the city and passage of acts of Assembly, as just mentioned, *and after certain decisions of the Supreme Court of Iowa as to the constitutionality of these acts*, the character and value of which decisions make the principal subject of discussion in this case,—the city of Dubuque issued a large amount of coupon bonds, which were now in the hands of the plaintiffs. The bonds bore date on the first of July, 1857, and were payable to Edward Longworthy, *or bearer*, on the first of January, 1877, at the Metropolitan Bank, in the city of New York. The coupons were for the successive half year's interest accruing on the bonds respec-

tively, and were payable at the same place. The bonds recited that they were given "for and in consideration" of stock of the Dubuque Western Railroad Company (one of the roads to which, by the act last mentioned, the city was authorized to subscribe), and that for the due payment of their principal and interest, "the said city is hereby pledged, in accordance with the Code of Iowa, and an act of the General Assembly of the State of Iowa, of January 28, 1857," the act just referred to. The coupons on the bonds not being paid, the plaintiffs sued the city of Dubuque in the District Court of the United States for the District of Iowa, claiming to recover the amount specified in the coupons, with the New York rate of interest from the time of their maturity, and exchange on the city of New York.

The city set up the following grounds of defense:

1. That the bonds were issued by the city to aid in the construction of a railroad extending *beyond its limits into the interior of the State.*

2. That at the time of issuing the bonds and coupons, the indebtedness of the city *exceeded one hundred thousand dollars.*

3. That at the time of issuing the bonds and coupons, the indebtedness of *the State of Iowa exceeded one hundred thousand dollars.*

4. That at the time of issuing the bonds and coupons, the indebtedness of *the cities and counties of Iowa exceeded,* in the aggregate, *one hundred thousand dollars.*

The plaintiffs demurred. The demurrer was overruled, and judgment entered for the defendant. On error, the question in this court was, whether the judgment had been rightly given?

Mr. JUSTICE SWAYNE delivered the opinion of the court:

The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated.

The act incorporating the city, approved February 24, 1847, provides as follows:

"Section 27. That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose the question shall be submitted to the citizens of Du-

buque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes, the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

By an act approved January 8, 1851, the act of incorporation was "so amended as to empower the city council to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said act."

An act approved January 28, 1857, contains these provisions:

"That the city of Dubuque is hereby authorized and empowered to aid in the construction of the Dubuque Western and the Dubuque, St. Peters and St. Paul Railroad Companies, by issuing $250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the city council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote and bonds issued or to be issued are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power contained in the 27th section of the act of incorporation are not now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.

Commissioners of Knox Co. v. Aspinwall, 21 How., 539; *Royal British Bank v. Turquand*, 6 Ellis & Blackburne, 327; *Farmers' Land & T. v. Curtis*, 3 Selden, 466; *Stoney v. A. L. I. Co.*, 11 Paige, 635; *Morris Canal & B. Co. v. Fisher*, 1 Stockton's Chancery, 667; *Willmarth v. Crawford*, 10 Wendell, 343; *Allagheny City v. McClurkan*, 14 Pennsylvania State, 83. If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the act of January 28, 1857.

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came under the consideration of the Supreme Court of Iowa in *McMillen et al. v. Boyles*, 6 Iowa, 305, and again in *McMillen et al. v. The County Judge and Treasurer of Lee County*, Id., 391. The validity of the act was sustained. Without these rulings we should entertain no doubt upon the subject. *Wilkinson v. Leland*, 2 Peters, 627; *Satterlee v. Matthewson*, 2 Id., 380; *Baltimore & S. R. Co. v. Nesbit et al.*, 10 Howard, 395; *Whitewater Valley Canal Co. v. Vallette*, 21 Id., 425.

It is claimed "that the legislature of Iowa had no authority under the constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." In this connection our attention has been called to the following provisions of the constitution of the State:

"ART. 1, §6. All laws of a general nature shall have a uniform operation."

"ART. 3, §1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated as the General Assembly of the State of Iowa," etc.

"ART. 7. The General Assembly shall not in any manner create any debt or debts, liability or liabilities which shall, singly or in the aggregate, exceed the sum of one hundred thousand dollars, except," etc. The exceptions stated do not relate to this case.

"ART. 8, §2. Corporations shall *not be created in this*

State by special laws, except for political or municipal purposes, but the General Assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not, directly or indirectly, become a stockholder in any corporation."

Under these provisions it is insisted:

1. That the general grant of power to the legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case.

2. That the seventh article of the constitution prohibits the conferring of such power under the circumstances stated in the answer—debts of counties and cities being, within the meaning of the constitution, debts of the State.

3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa. *Dubuque Co. v. The Dubuque & Pacific R. R. Co.*, 4 G. Greene, 1; *The State v. Bissell*, 4 Id., 328; *Clapp v. Cedar Co.*, 5 Iowa, 15; *Ring v. County of Johnson*, 6 Id., 265; *McMillen v. Boyles*, 6 Id., 304; *McMillen v. County Judge of Lee Co.*, 6 Id., 393; *Games v. Robb*, 8 Id., 193; *State v. The Board of Equalization of the County of Johnson*, 10 Id., 157. The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the Supreme Court of this State, in the later case of the *State of Iowa, ex relatione, v. The County of Wapello*, 13 Iowa, 390; and it is insisted that in cases involving the con-

struction of a State law or constitution, this court is bound to follow the latest adjudication of the higher court of the State. *Leffingwell v. Warren*, 2 Black, 599, is relied upon as authority for the proposition. In that case this court said it would follow "the latest settled adjudications." Whether the judgment in question can under the circumstances be deemed to come within that category it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions we think are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligations cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." *The Ohio Life and Trust Co. v. Debolt*, 16 Howard, 432.

The same principle applies when there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case they will be entitled to the amount specified in the coupons, with interest and exchange as claimed. *White v. The V. & M. R. R. Co.*, 21 How., 575; *Commissioners of the County of Knox v. Aspinwall et al.*, 21 Id., 539.

We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts, giving constructions to the laws and constitution of their States. It is the settled rule of this court in such cases to follow the decisions of the State courts. But there has been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.

JUDGMENT AND MANDATE ACCORDINGLY.

Opinion of Mr. JUSTICE MILLER, *dissenting.*

In the opinions which have just been delivered I have not been able to concur. But I should have contented myself with a mere expression of dissent, if it were not that the principle on which the court rests its decision is one, not only essentially wrong, in my judgment, but one which, if steadily adhered to in the future, may lead to consequences of the most serious character. In adopting this principle this court has, as I shall attempt to show, gone in the present case a step in advance of anything heretofore ruled by it on the subject, and has taken a position which must bring it into direct and unseemly conflict with the judiciary of the States. Under these circumstances I do not feel at liberty to decline placing upon the records of the court the reasons which have forced me, however reluctantly, to a conclusion different from that of the other members of the court.

The action in the present case is on bonds of the city of Dubuque, given in payment of certain shares of the capital stock of a railroad company, whose road runs from said city westward. The court below held that the bonds were void for want of authority in the city to subscribe and pay for such stock. It is admitted that the legislature had, as to one set of bonds, passed an act intended to confer such authority on the city, and it is claimed that it had done so as to all the bonds. I do not propose to discuss this latter question.

It is said, in support of the judgment of the court below, that all such grants of power by the legislature of Iowa to any municipal corporation is in conflict with the constitution of the State and, therefore, void. In support of this view of the subject, the case of *Stokes v. Scott County*, 10 Iowa, 166, and the *State of Iowa, ex relatione, v. The County of Wapello*, 13 Id., 398, are relied on. In the last mentioned case, the county of Wapello had agreed to take stock in a company whose road passed through the county, but had afterwards refused to issue the bonds which had been voted by the majority of the legal voters. The relator prayed a writ of *mandamus* to compel the officers of the county to issue the bonds. One question raised in the discussion was, whether section 114 of the Code of Iowa, of 1851, was intended to authorize the counties of the State to take stock in railroad companies? And another was, that conceding such to be the fair construction of that section of the Code, was it constitutional?

The Supreme Court, in a very elaborate and well-reasoned opinion, held that there was no constitutional power in the legislature to confer such authority on the counties, or on any municipal corporation. This decision was made in a case where the question fairly arose, and where it was necessary and proper that the court should decide it. It was decided by a full bench, and with unanimity. It was decided by the court of highest resort in that State, to which is confided, according to all the authorities, the right to construe the constitution of the State, and whose decision is binding on all other courts which may have occasion to consider the same questions, until it is reversed or modified by the same court. It has been followed in that court by several other decisions to the point not yet reported. It is the law administered by all the inferior judicial tribunals in the State, who are bound by it beyond all question. I apprehend that none of my brethren who concur in the opinion just delivered, would go so far as to say that the inferior State courts would have a right to disregard the decision of their own appellate court, and give judgment that the bonds were valid. Such a course would be as useless as it would be destructive of all judicial subordination.

Yet this is in substance what the majority of the court have decided.

They have said to the Federal court sitting in Iowa, "you shall disregard this decision of the highest court of the State on this question. Although you are sitting in the State of Iowa, and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest exposition of its constitution by the Supreme Court of that State, but you shall decide directly to the contrary; and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void, issued in that State, because they violate its constitution, you shall say they are valid, because they do not violate the constitution.

Thus we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute, yet always arriving at opposite results, with no common arbiter of their differences. There is no hope of avoiding this, if this court adheres to its ruling. For there is in this court no power, in this class of cases, to issue its writ of error to the State court, and thus compel a uniformity of construction, because it is not pretended that either the statute of Iowa, or its constitution, or the decision of its courts thereon, are in conflict with the constitution of the United States, or any law or treaty made under it.

Is it supposed for a moment that this treatment of its decision, accompanied by language as unsuited to the dispassionate dignity of this court, as it is disrespectful to another court of at least concurrent jurisdiction over the matter in question, will induce the Supreme Court of Iowa to conform its rulings to suit our dictation, in a matter which the very frame and organization of our government places entirely under its control? On the contrary, such a course, pursued by this court, is well calculated to make that court not only adhere to its own opinion with more tenacity, but also to examine if the law does not afford them the means, in all cases, of enforcing their own construction of their own constitution and their own statutes within the limits of their own jurisdiction. What this may lead to it is not possible now to forsee, nor do I wish

to point out the field of judicial conflicts, which may never occur, but which, if they shall occur, will weigh heavily on that court which should have yielded to the other, but did not.

The general principle is not controverted by the majority, that to the highest courts of the State belongs the right to construe its statutes and its constitution, except where they may conflict with the constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State court that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively for all other courts the constitution and laws of the federal government. See *Shelby v. Guy*, 11 Wheaton, 361; *McCluny v. Silliman*, 3 Peters, 277; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 Id., 504; *Elmendorf v. Taylor*, 10 Wheaton, 152; *The Bank v. Dudley*, 2 Peters, 492.

But while admitting the general principle thus laid down, the court says it is inapplicable to the present case because there have been conflicting decisions on this very point by the Supreme Court of Iowa, and that as the bonds issued while the decisions of that court holding such instruments to be constitutional were unreversed, that this construction of the constitution must now govern this court instead of the later one. The moral force of this proposition is unquestionably very great. And I think, taken in connection with some fancied duty of this court to enforce contracts, over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule which, in my opinion, cannot be sustained either on principle or authority.

The only special charge which this court has over contracts beyond any other court, is to declare judicially whether the statute of a State impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are

called upon not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the State court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the constitution of the State. It is a grave error to suppose that this court must or should determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties have purchased bonds which were supposed to be valid contracts when they really were not.

The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853 and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.

Not only is the decision of the court, as I think, thus unsound in principle, but it appears to me to be in conflict with its former decisions on this point, as I shall now attempt to show.

In the case of *Shelby v. Guy*, 11 Wheaton, 361, a question arose on the construction of the statute of limitations of Tennessee. It was an old English statute, adopted by Tennessee from North Carolina, and which had in many other States received a uniform construction. It was stated on the argument, however, that the highest court of Tennessee had given a different construction to it, although the opinion could not then be produced. The court said, that out of a desire to follow the courts of the State in the construction of their own

statute, it would not then decide that question, but as the case had to be reversed on other points, it would send it back, leaving that question undecided.

In the case of *The United States v. Morrison*, 4 Peters, 124, the question was, whether a judgment in the State of Virginia was, under the circumstances of that case, a lien on the real estate of the judgment debtor. In the Circuit Court this had been ruled in the negative, I presume by Chief Justice MARSHALL, and a writ of error was prosecuted to this court. Between the time of the decision in the Circuit Court and the hearing in this court, the Court of Appeals of Virginia had decided in a case precisely similar, that the judgment was a lien. This court, by Chief Justice MARSHALL, said it would follow the recent decision of the Court of Appeals without examination, although it required the reversal of a judgment in the Circuit Court rendered before that decision was made.

The case of *Green v. Neal*, 6 Peters, 291, is almost parallel with the one now under consideration, but stronger in the circumstances under which the court followed the later decision of the State courts in the construction of their own statute. It is stronger in this, that the court overruled two former decisions of its own, based upon former decisions of the State court of Tennessee, in order to follow a later decision of the State court, after the law had been supposed to be settled for many years. The case was one on the construction of the statute of limitations, and the Circuit Court at the trial had instructed the jury, "that according to the present state of decisions in the Supreme Court of the United States, they could not charge that defendants' title was made good by the statute of limitations." The decisions here referred to were the cases of *Patton v. Easton*, 1 Wheaton, 476; *Powell v. Harman*, 2 Peters, 241; erroneously cited in *Green v. Neal*, 6 Id., 291; as *Powell v. Green.*

The first of these cases was argued in the February term, 1815, by some of the ablest counsel of the day, and the opinion delivered more than a year afterwards. In that opinion Chief Justice MARSHALL recites the long dispute about the point in North Carolina and Tennessee, and says it has at length been settled by the Supreme Court of the latter

State by two recent decisions, made after the case then before it had been certified to this court, and the court follows those decisions. This is reaffirmed in the second of the above mentioned cases.

In delivering the opinion in the case of *Green v. Neal*, Justice McLean says that the two decisions in Tennessee referred to by Judge Marshall were made under such circumstances that they were never considered as fully settling the point in that State, *there being contrariety of opinion among the judges*. The question, he says, was frequently raised in the Supreme Court of Tennessee, but was never considered as finally settled until 1825, the first decision having been made in 1815. The opinion of Judge McLean is long, and the case is presented with his usual ability, and I will not here go into further details of it. It is sufficient to say that the court holds it to be its duty to abandon the two first cases decided in Tennessee, to overrule their own well considered construction in the case of *Patton v. Easton*, and its repetition in *Powell v. Green*, and to follow without examination the later decision of the Supreme Court of Tennessee, which is in conflict with them all. At the last term of this court, in the case of *Leffingwell v. Warren*, 2 Black, 599; my very learned associate, who has just delivered the opinion in this case, has collated the authorities on this subject, and thus on behalf of the whole court anounces the result.

"The construction given to a State statute by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * * * * * *

"If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow its latest settled adjudication." *United States v. Morrison*, 4 Peters, 124; *Green v. Neal*, 6 Id., 291.

It is attempted, however, to distinguish the case now before us from those just considered by saying that the latter relate to what is rather ambiguously called a rule of property, while the former concerns a matter of contract. I must confess my inability to see any principle on which the distinction can

rest. All the statutes of the States which prescribe the formalities and incidents to conveyances of real estate would, I presume, be held to be rules of property. If the deed by which a man supposes he has secured to himself and family a homestead, fails to comply in any essential particular with the statute or constitution of the State, as expounded by the most recent decision of the State court, it is held void by this court without hesitation, because it is a rule of property, and the last decision of the State court must govern, even to overturning the well-considered construction of this court. But if a gambling stock-broker of Wall Street buys, at twenty-five per cent of their par value, the bonds issued to a railroad company in Iowa, although the court of the State in several of its most recent decisions have decided that such bonds were issued in violation of the constitution, this court will not follow that decision, but resort to some former one delivered by a divided court, because in the latter case it is not a rule of property, but a *case of contract.* I cannot rid myself of the conviction that the deed which conveys to a man his homestead, or other real estate, is as much a contract as the paper issued by a municipal corporation to a railroad for its worthless stock, and that a bond when good and valid is property. If bonds are not property, then half the wealth of the nation, now so liberally invested in the bonds of the government, both State and national, and in bonds of corporations, must be considered as having no claim to be called property. And when the construction of a constitution is brought to bear upon the questions of property or no property, contract or no contract, I can see no sound reason for any difference in the rule for determining the question.

The case of *Rowan v. Runnels*, 5 Howard, 134, is relied on as furnishing a rule for this case, and support to the opinion of the court. In that case the question was on the validity of a note given for the purchase of slaves imported into the State of Mississippi. It was claimed that the importation was a violation of the constitution of the State, and the note, therefore, void. In the case of *Groves v. Slaughter*, 15 Peters, 449, this court had previously decided that very point the other way. In making that decision it had no light from the courts

of Mississippi, but was called upon to make a decision in a case of the first impression. The court made a decision with which it remained satisfied when *Rowan v. Runnels* came before it, and which is averred by the court to have been in conformity to the expressed sense of the legislature and the general understanding of the people of that State.

The court, therefore, in *Rowan v. Runnels*, declined to change its own rulings under such circumstances to follow a single, later and adverse decision of the Mississippi court.

In the case now before the court, it is not called on to retract any decision it has ever made, or any opinion it has declared. The question is before the court for the first time, and it lacks in that particular the main ground on which the judgment of this court rested in *Rowan v. Runnels*. It is true that the chief justice, in delivering the opinion in that case, goes on to say, in speaking of the decision of the State courts on their own constitution and laws: "But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into *with citizens of other States*, which, in the *judgment of this court*, were lawfully made." I have to remark, in the first place, that this *dictum* was unnecessary, as the first and main ground was that this court could not be required to overrule its own decision, when it had first occupied the ground, and when it still remained of the opinion then declared. Secondly, that the contract in *Rowan v. Runnels* was between a citizen of Mississippi, on the one part, and a citizen of Virginia, on the other, and the language of the chief justice makes that the ground of the right of this court to disregard the later decision of the State court; and in this case the contract was made between the city of Dubuque and a railroad company, both of which were corporations existing under the laws of Iowa, and citizens of that State, in the sense in which that word is used by the chief justice. And, thirdly, the qualification is used in the Runnels case that the "*contracts were, in the judgment of this court, lawfully made.*" In the present case, the court rests on the former decision of the State court, declining to examine the constitutional question for itself. The distinction between the cases is so obvious as to need no further illustration.

The remaining cases in which the subject is spoken of, may be mentioned as a series of cases brought into the Supreme Court of the United States, by writ of error to the Supreme Court of Ohio, under the twenty-fifth section of the judiciary act. In all these cases the jurisdiction of the Supreme Court of the United States was based upon the allegation that a statute of Ohio, imposing taxes upon bank corporations, was a violation of a previous contract made by the State with them, in regard to the extent to which they should be liable to be taxed. In the argument of these cases it was urged that the very judgments of the Supreme Court of Ohio, which were then under review, being the construction placed by the courts of that State on their own statutes and constitution, should be held to govern the Supreme Court of the Union in the exercise of its acknowledged right of revising the decision of the State court in that class of cases. It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of the Federal Supreme Court to sit as a revisory tribunal over the State courts, in cases where the State law is supposed to impair the obligation of a contract, would be the merest sham.

It is true that in the extract, given in the opinion of the court just read, from the case of the *Ohio Trust Company v. Debolt*, language is used by Chief Justice TANEY susceptible of a wider application. But he clearly shows that there was nothing in his mind beyond the case of a writ of error to the Supreme Court of a State, for he says in the midst of the sentence cited, or in the immediate context: "The writ of error to a State court would be no protection to a contract, if we were bound to follow the judgment which the State court had given, and which the court brings up here for revision." Besides, in the opinion thus cited, the chief justice says, in the commencement of it, that he only speaks for himself and Justice GRIER.

The remarks cited, then, were not the opinion of the court, were outside the record, and were evidently intended to be confined to the case of a writ of error to the court of a State, where it was insisted that the judgment sought to be revised should conclude this court.

But let us examine for a moment the earlier decisions in the State court of Iowa, on which this court rests with such entire satisfaction.

The question of the right of municipal corporations to take stock in railroad companies, came before the Supreme Court of Iowa, for the first time, at the June term, A. D. 1853, in the case of *Dubuque County v. The Dubuque and Pacific Railroad Company*, 4 G. Greene, 1. The majority of the court, KINNEY, J., dissenting, affirmed the judgment of the court below, and in so doing must necessarily have held that municipal corporations could take stock in railroad enterprises. The opinions of the court were by law filed with the clerk, and by him copied into a book kept by him for that purpose. The dissenting opinion of Judge KINNEY, a very able one, is thus found in its proper place, in which he says, he has never seen the opinion of the majority. No such opinion is to be found in the clerk's office, as I have verified by a personal examination. Nor was it ever seen, until it was published five years afterward, in the volume above referred to, by one of the judges, who had ceased to be either judge or official reporter at the time it was published. Shortly after this judgment was rendered Judge KINNEY resigned, and his place was supplied by Judge HALL. The case of the *State v. Bissell*, 4 Id., 328, then came before the court in 1854. In this case, after disposing of several questions relating to the regularity of the proceeding in issuing bonds for a railroad subscription Judge HALL, who delivered the opinion of the court, then refers to the right of the county to take stock and issue bonds for railroad purposes. He says: "This point is not urged, and the same question having been decided at the December term of this court in 1853, in the case of the *Dubuque and Pacific Railroad Company v. Dubuque County*, is not examined. This decision is not intended to sanction or deny the legal validity of that decision, but to leave the question where that decision left it." It is clear that if Judge HALL had concurred with the other two judges no such language as this would have been used, but they would have settled the question by a unanimous opinion. In the case of *Clapp v. Cedar County*, 5 Iowa, 15, the question came up again in the same

court, composed of new judges. The Chief Justice, WRIGHT, was against the power of the counties to subscribe stock, and delivered an able dissenting opinion to that purport. The other two judges, however, while in substance admitting that no such power had been conferred by law, held that they must follow the decision of the Dubuque case. Several other cases followed these, with about the same result, up to 1859, Wright always protesting, and the other judges overruling him.

In 1859, in the case of *Stokes v. Scott County*, 10 Id., 166, which was an application to restrain the issue of bonds voted by the county, Judge STOCKTON said that in a case like that, where the bonds had not passed into the hands of *bona fide* holders, he felt at liberty to declare them void, and concurring with Judge WRIGHT that far, they so decided; Judge WRIGHT placing his opinion upon a want of constitutional power in the legislature. Finally, in the case of the *State of Iowa, ex relatione, v. Wapello County*, the court, now composed of WRIGHT, LOWE and BALDWIN, held unanimously that the bonds were void absolutely, because their issue was in violation of the constitution of the State of Iowa. The opinion in that case, delivered by Judge LOWE, covers the whole ground, and after an examination of all the previous cases, overrules them all, except *Stokes v. Scott County*. It is exhausting, able, and conclusive, and after a struggle of seven or eight years, in which this question has been always before the court, and never considered as closed, this case may now be considered as finally settling the law on that subject in the courts of Iowa. It has already been repeated in several cases not yet reported. It is the first time the question has been decided by a unanimous court. It is altogether improbable that any serious effort will ever be made to shake its force in that State; for of the nine judges who have occupied the bench while the matter was in contest, but two have ever expressed their approbation of the doctrine of the Dubuque county case.

Comparing the course of the decisions of the State courts in the present case with those upon which this court acted in *Green v. Neal*, 6 Peters, 291, how do they stand?

In the latter case the court of Tennessee had decided by a divided court in 1815, and that decision was repeated sev-

eral times, but with contrariety of opinion among the judges, up to 1825, when the former decisions were reversed. In the cases which we have been considering from Iowa, the point was decided in 1853 by a divided court; it was repeated several times up to 1859, by a divided court, under a continuous struggle. In 1859 the majority changed to the other side, and in 1862 it became unanimous. In the Tennessee case this court had twice committed itself to the decision first made by the courts of that State; yet it retracted and followed the latter decision made ten years after. In the present case, this court, which was not committed at all, follows decisions which were never unanimous, which were struggled against and denied, and which had only six years of judicial life, in preference to the later decisions commenced four years ago, and finally receiving the full assent of the entire court.

I think I have sustained, by this examination of the case, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right which belongs to State courts, to decide as a finality upon the construction of State constitutions and State statutes. This invasion is made in a case where there is no pretense that the constitution, as thus construed, is any infraction of the laws or constitution of the United States.

The importance of the principles thus for the first time asserted by this court, opposed, as it is, to my profoundest convictions of the relative rights, duties and comities of this court, and the State courts, will, I am persuaded, be received as a sufficient apology for placing on its record, as I now do, my protest against it.

NOTES.

Bona fide holder of municipal bonds, protested.—The case of *Gelpcke v. Dubuque*, *supra*, was preceded by two cases in the Supreme Court of the United States, in which the doctrine of the law merchant, maintaining the immunity of negotiable paper in the hands of a *bona fide* holder, triumphed over the doctrine of *ultra vires*.

In the case of *Knox County v. Aspinwall*, 21 How., 539; the suit was

brought on coupons, detached from the bonds. The statute of the State of Indiana provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine, after a certain notice should be given of the time and place of an election for that purpose. The board subscribed for stock and issued the bonds, to which the coupons sued on were attached, purporting to act in compliance with the statute. On the face of each bond there was the printed statement: "This bond is issued in part payment of a subscription of two hundred thousand dollars by the said Knox county, to the capital stock" etc., "by order of the board of commissioners" etc. The defense set up was, that the board of commissioners had no authority to execute, or to authorize to be executed, the bonds or coupons in question; owing to the alleged fact that there was an omission to comply with the statute in respect to the notices of the election, and that a majority of the votes had not been cast in favor of the subscription. But the court held, that the defendant could not call in question the existence or regularity of the notice in a suit against them by the innocent holders of the coupons attached to the bonds in this collateral way; that the board of commissioners were the proper judges whether a majority of the votes had been cast in favor of the subscription to the stock; and that as the bonds on their face imported a compliance with the law under which they were issued, the purchaser was not bound to look further for evidence of a compliance with the condition of the grant of power; and that a suit could be maintained upon the coupons without the production of the bonds to which they were originally attached. In this case the opinion of the court was given by Mr. Justice NELSON, who observed: "It is insisted that an irregularity or omission in these notices [of the election] had the effect to deprive the board of this authority [to execute the bonds], or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election and are not therefore entitled to the character of *bona fide* holders of the securities.

"The act in pursuance of which the bonds were issued is a public statute of the State, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must, therefore, look into the statute for the purpose of determining this question; and upon looking into it we see that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

"This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court in this collateral way, in

every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making a subscription? The court is of opinion that the question belonged to this board. * * * We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."

The same principle was adopted in *Bissell v. Jeffersonville*, 24 How., 287. Here the common council of the city of Jeffersonville, in the State of Indiana, assuming that they were authorized by the statute of that State so to do, subscribed for stock in a railroad company, and issued bonds therefor, on a petition signed by three-fourths of the legal voters of the city. Before the bonds were issued, however, the Supreme Court of the State decided, in a similar case, that no such authority was conferred upon cities by the statute; but, subsequent to such decision, the legislature of that State passed an act to enable cities which had subscribed for stock in companies incorporated to construct works of public utility to ratify such subscription; and it was further provided in said act that upon such ratification by the common council of any city, which had subscribed for stock as aforesaid, upon the supposition that they had power so to do, that such subscription, and the obligation and liabilities, and the corporate bonds or obligations issued or to be issued therefor by said city, should be valid.

The plaintiffs became the holders for value in the usual course of business of thirty-seven of these bonds of the city of Jeffersonville, of the sum of one thousand dollars each, on which the suit was brought. A commissioner appointed by the court, prior to the trial in the court below, to take testimony and report it with his finding of facts proved by it, reported that three-fourths of the legal voters of the city had not signed the petition to the common council, which constituted the foundation of their action in making the subscription to the stock and the issuing the bonds. The court instructed the jury, among other things, to the effect that if they found from the evidence that three-fourths of the legal voters of the city had not petitioned for the subscription to the stock and the issuing of the bonds, their verdict should be for the defendants. The verdict was for the defendants, and the case was taken up by a writ of error from the Circuit Court of the United States for the District of Indiana to the Supreme Court, where it was held that the city council were, by the statute of Indiana, made the tribunal to decide the question whether in fact the petitioners constituted three-fourths of the legal voters of the city; and that in a suit upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city, and the judgment below was reversed. Mr. Justice CLIFFORD, who gave the opinion of the court, said: "Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition as described in the explanatory act, and of necessity there must be

some tribunal to determine whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested either in the charter or the explanatory act, and it would be difficult to point out any other, sustaining a similar relation to the city, so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of the *Commissioners of Knox County v. Aspinwall et al.*, 21 How., 544, we are of opinion that 'this board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it.' Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company without interference or complaint. When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for its stock, it was too late to call in question the fact determined by the common council, and *a fortiori*, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value."

Similar in principle was the decision in the case of the *Royal British Bank v. Turquand*, 6 El. & Bl., 325, in the Exchequer Chamber in 1856. The defendant was the official manager of an incorporated company, under the joint stock companies winding-up acts. The suit was on the bond of the company executed before the defendant became the official manager, for the purpose of securing the plaintiffs, who were bankers, any sums which might become due them from the company to the amount of 1,000*l.*, on current account. The company was formed for the purpose of carrying on mining operations and forming a railway. The registered deed of settlement of the company provided, among other things, that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed. At a general meeting of the company it was resolved, in the language of the replication, "that the directors of the said company should be, and they were thereby authorized to borrow on mortgage bond, or otherwise, such sums, for such periods, and at such rates of interest as they might deem expedient in accordance with the terms of the deed of settlement and act of Parliament;" and the plaintiffs claimed that by virtue of this resolution the bond sued on was executed. Defendants insisted that the resolution gave no authority as it did not specify the sum to be borrowed. There was judgment for the plaintiff. On error, JARVIS, C. J., observes: "I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. * * * The deed [of settlement] allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed; and the replication shows a resolution passed at a general meeting authorizing the directors to borrow on bond such sums, for such periods, and at such rates of interest as they might deem

expedient, in accordance with the deed of settlement and the act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide, for it seems to us that the plea, whether we consider it as a confession and avoidance or a special *non est factum*, does not raise any objection to this advance as against the company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." In this decision, POLLOCK, C. B., ALDERSON, B., CRESWELL, J., CROWDER, J., and BRAMWELL, B., concurred; and the judgment below was affirmed. See case in the Queen's Bench, *Royal British Bank v. Turquand*, 5 E. & B., 248.

The doctrine has been more restricted in its application to the contracts of municipal corporations. See opinion of DILLON, J., in *Clark v. The City of Des Moines*, selected case, *post;* FIELD, C. J., in *Zottman v. San Francisco*, 20 Cal., 76; *Hague v. City of Philadelphia*, 48 Pa. St., 527, and notes to selected cases, *ante*, chapter IX.

Municipal bonds and coupons—negotiable quality of.—It seems now well settled that municipal bonds, as well as the bonds of private corporations, intended to pass from one to another by delivery, though not made payable to order or bearer, and even though they may be under seal, have the properties of negotiable paper, and may be transferred in the usual way of such paper.

In *Mercer Co. v. Hacket*, 1 Wall., 95, Mr. Justice GRIER observes: "This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by the courts as a part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade judgment by pleading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and

have received the judicial recognition not only of this court, but of nearly every State in the Union, is well known and admitted." See, also, *Murry v. Lardner*, 2 Id., 110; *Thompson v. Lee County*, 3 Id., 327; *Aurora City v. West*, 7 Id., 82; *City v. Lamson*, 9 Id., 481; *Smith v. Sac County*, 11 Id., 150; *Pendleton County v. Brittain*, 15 Id., 566; *Kenicott v. Supervisors*, 16 Id., 452; *St. Joseph v. Rogers*, 19 Id., 241; *Clark v. Iowa City*, 20 Id., 583; *Society, etc., v. City of New London*, 29 Conn., 174; *Bank of Rome v. Village of Rome*, 19 N. Y., 20; *Voce v. Richmond*, 18 Gratt., 338; *Barrett v. Schuyler County*, 44 Mo., 197; *Smith v. Clark County*, 54 Id., 58; *Craig v. City of Vicksburg*, 31 Miss., 217; *Johnson v. County*, 24 Ill., 92; *Clapp v. Cedar County*, 5 Iowa, 15; *Clark v. Janesville*, 10 Wis., 136.

Municipal bonds good on their face.—In *City of Lexington v. Butler*, 14 Wall., 282, the facts were these: The City of Lexington, Kentucky, in 1853, issued to the Lexington & Big Sandy Railroad Company one hundred and fifty bonds of the city, each of $1,000, with coupons attached, sealed with the corporate seal of the city, and signed by the mayor and clerk of the corporation, in payment of that amount of subscription by the city to the stock of the said railroad company. The railroad company, as the holders and owners, indorsed the bonds in blank and transferred the same to divers persons and corporations, as the means of raising money to construct their road, and in this way the plaintiff became the purchaser of four bonds and the coupons sued on. The bonds on their face recited that they were issued in part payment of said subscription by the mayor and council of said city, as authorized by a vote of the people, in pursuance of an act of the assembly of that State, approved 9th January, 1852.

One ground of defense was, that the city was not liable on the bonds, because the conditions precedent to the right of the corporation to subscribe for the stock of the railroad company and to issue bonds were never fulfilled; that the conditions annexed to the right, as enacted by the legislature, were that the proposition to subscribe should be submitted to the qualified voters of the corporation, and that it should be approved by a majority of those voting on the question; that the proposition as submitted did not authorize a subscription unless a million of dollars were previously subscribed by other parties; that said amount had not been subscribed; that the State court had, by *mandamus*, compelled the authorities of the city to issue the bonds; and that said action and judgment of the court had been reversed on appeal, etc.

The plaintiff filed a replication to the above matter, pleaded by the defendants, denying any notice of the matters set out in said plea.

Mr. Justice CLIFFORD, in this case, observes: "Issued by authority of law, as the bonds purport to have been, and being by the regular indorsement thereof made payable to bearer, they lawfully circulated from holder to holder by delivery, and the plaintiff having purchased four of the numbers in market overt, became the lawful indorsee and holder of the same, together with the coupons annexed; and the interest secured by the coupons being unpaid, he instituted the present suit to recover the amount. Evidently, the *prima facie* presumption in such a case is, that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which

would render the instruments invalid. Impliedly the plea admits that the bonds were purchased before they were due, and that the plaintiff gave a valuable consideration for the same, but the defendants allege that he took the same with notice of the irregularities in issuing the same, as set forth in the plea, and they rely on those allegations as a complete defense to the action, but the replication traversed the averment of the notice and tendered an issue to the county, and the defendants, by demurring to the replication, confessed the allegations of the plea in that behalf were untrue, and that the plaintiff was the *bona fide* holder of the bonds without notice of the alleged defects in the inception of the instruments.

Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the title and the rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.

Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

Remarks.—This case turned on the question of notice to the plaintiff of the alleged defects in the inception of the instruments sued on. But the act of the legislature gave the city authority to subscribe for the stock of the railroad company only on condition that a majority of the voters of the city voting on the question should authorize it, and although in fact the vote was had, it was not one which submitted the single question whether the subscription should be made, but whether it should be made provided one million dollars were first subscribed by other parties. In reply to the arguments against the application of the doctrine of *ultra vires* on account of the frequent hardship and injustice arising therefrom, it has frequently been said that the charter, or act creating them, is equally accessible to all, and parties dealing with corporations are presumed to know these powers, and should be held bound to take notice of them, and if they contract with them in relation to matters beyond the scope of the authority conferred upon them, they should not be heard to complain when the plea of *ultra vires* is made.

In the preceding case, the power conferred upon the city to subscribe for the stock was a public act of the legislature, coupled with the condition that a majority of the voters of the city should authorize it. They did not by their vote authorize an unconditional subscription. But on this point the case turned on the fact that the bonds purported to have been issued by au-

thority of law, and that the holder had a right to assume that they were issued under circumstances which gave the requisite authority. The same question was presented in the following cases: *Knox Co. v. Aspinwall*, 21 How., 539; *Bissell v. City of Jeffersonville*, 24 Id., 287; *Gelpcke v. Dubuque*, 1 Wall., 203; *Supervisors v. Schenck*, 5 Id., 784. But, see *Police Jury v. Britton*, 15 Wall., 566.

In *Knox Co. v. Aspinwall, supra*, where the statute of the State of Indiana provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of the election; and the board subscribed for the stock, and issued the bonds, purporting to act in compliance with the statute, it was held that it was too late to call in question the existence or regularity of the notices of election, in a suit against the county by the holders of the coupons attached to the bonds, who were innocent holders; that according to the true interpretation of the statute the board were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock; and that where the bonds themselves import a compliance with the law, a purchaser was not required to look for further evidence of a compliance with the condition to the grant of power.

Where the doctrine was held applicable to the bonds of a county.—In *Marsh v. Fulton County*, 10 Wall., 676, the county was authorized to subscribe for stock and issue bonds of the county therefor to any railroad company not exceeding $100,000, provided such subscription was previously sanctioned by a majority of the voters of the county at an election called for that purpose. At such election the county was authorized to subscribe to the Mississippi & Wabash R. Co., a company duly incorporated by the legislature of Illinois in 1853. By a subsequent act of the legislature the charter of said company was amended, by which the line of said company was divided into three divisions, designated as the Western, Central and Eastern. A subscription was made and bonds issued to the "Central Division of the Mississippi & Wabash Railroad Company, or bearer." In a suit on these bonds it was held that, notwithstanding it was brought by an innocent holder, they were invalid in his hands, as there was no authority to make and issue them.

In this case Mr. JUSTICE FIELD, who delivered the opinion of the court, observes: "This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case where the holder was bound to look to the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Accept-*

ances, 7 Wall., 676. In speaking of notes and bills issued or accepted by an agent acting under a general or special power, the court say: 'In such case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.

* * * We do not mean to say that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and a different way." See, also, *McCracken v. San Francisco*, 16 Cal., 624; *Argenti v. Same*, Id., 255.

CHAPTER XI.

MUNICIPAL WARRANTS, ISSUED WITHOUT AUTHORITY, ARE VOID EVEN IN THE HANDS OF INNOCENT HOLDERS.

TWENTY-FOURTH SELECTED CASE.

CLARK v. THE CITY OF DES MOINES.*

1. MUNICIPAL CORPORATION: AGENT'S POWER.—Agents, officers, or even a city council of a municipal corporation, cannot bind the corporation by any act which transcends their lawful or legitimate powers. And this rule applies to the issue of negotiable as well as unnegotiable evidences of debt.

2. ———: NOTICE OF POWER.—The duties and powers of the officers of a municipal corporation are prescribed by the statute, and every person dealing with them as such may know, and is charged with knowledge of, the nature of these duties and the extent of these powers.

3. ———: PLEA OF ULTRA VIRES.—A corporation may set up a plea of *ultra vires*, or its own want of power under its charter or constituent statute to enter into a given contract, or to do a given act, in excess of its corporate power or authority.

4. CONTRACT: NEGOTIABLE.—Negotiability will not validate obligations which are not binding because of want of power to make them.

5. MUNICIPAL CORPORATIONS: WARRANTS.—Warrants drawn by the proper officers of a municipal corporation on the treasury thereof, are not bills of exchange, but are, in legal effect, the promissory notes of the corporation.

6. ———: POWERS EXPRESSED AND IMPLIED.—Municipal corporations have and can exercise only such powers as are expressly granted, and such incidental ones as are necessary to make these powers available, and are essential to effectute the purposes of the corporation; and these powers are strictly construed.

*Reported in 19 Iowa, 199 (1865).

7. ———: POWER TO ISSUE NEGOTIABLE PAPER.—When the officers of the city have no express power to issue for current, ordinary debts, negotiable paper which shall be free from equities in the hands of purchasers, and it is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, it cannot be held to exist by implication.

8. ———: WARRANTS: NOTICE.—The assignee of warrants drawn by the officers of a municipal corporation on the treasury thereof, is bound, at its peril, to ascertain the nature and extent of the powers of such officers and of such corporation.

9. ———: UNAUTHORIZED REPRESENTATIONS.—The want of corporate power or the want of authority in the municipal officers, cannot be supplied by their unauthorized action or representations.

10. USURY: WARRANTS.—Warrants issued by a municipal corporation in payment of a judgment at the rate of one dollar in warrants for every seventy-five cents due on the judgment, are tainted with usury.

11. MUNICIPAL CORPORATIONS: OVER-ALLOWANCE.—It may be doubted whether a municipal corporation is bound by the action of its council in agreeing to pay a sum clearly, distinctly and ascertainably greater than is legally due.

12. DES MOINES: ROAD FUNDS.—Under sections twenty-three and twenty-seven of the charter of the city of Des Moines (Chap. 185, laws of 1857), the care of the roads and streets within the limits of said city is a corporate matter; and all charges therefor are payable primarily out of the city treasury; and the liability of the corporation cannot be changed or varied by the form in which warrants are drawn or worded by municipal officers.

13. MUNICIPAL CORPORATIONS: TOLL-BRIDGE.—No municipal corporation can erect a toll-bridge and levy and collect tolls, unless authorized by the law of the State.

14. DES MOINES: POWER TO ERECT BRIDGE.—The city of Des Moines possessed no power, under the charter of 1857, to erect a toll-bridge, either by itself or jointly with an individual.

15. MUNICIPAL CORPORATIONS: LOAN OF CREDIT.—A municipal corporation has no power to lend its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises.

16. DES MOINES: SIDEWALKS.—The building of sidewalks was, under the charter of 1857, a legitimate municipal object.

17. MUNICIPAL CORPORATIONS: SCRIP.—When a municipal corporation, acting under the constitution of 1846, issued in payment of a *bona fide* indebtedness, scrip to circulate as money, after which the scrip was taken up by the issuance of ordinary warrants on the treasury thereof for the amount of the same, it was held that the transaction could not be impeached by the corporation on the ground that the scrip was illegal and void.

18. EVIDENCE: SIGNATURE TO WARRANTS.—In an action against a municipal corporation, upon warrants, if the warrants are set out in the petition by copy, and their execution is not denied under oath, they may be admitted in evidence without proof of the genuineness of the signature, or of the authority to issue the same.

Appeal from Polk District Court.

CITY WARRANTS: HOW FAR NEGOTIABLE: NATURE OF MUNICIPAL POWERS: ULTRA VIRES: CITY SCRIP: ORDERS ON DIFFERENT FUNDS: PROOF OF, ETC.—This is an action against the city of Des Moines, based upon two hundred and twenty-two different city warrants or orders. The plaintiff sues as assignee or holder. He was not the payee of any of them. A copy of one of the class of orders payable out of the "general fund," is as follows:

No. 783. CITY WARRANT. $8.00

DES MOINES, IOWA, October 21, 1862.

To the Treasurer of the City of Des Moines:

Pay *U. H. White* or bearer, eight dollars, out of any moneys in the general fund, not otherwise appropriated.

THOS. CAVANAUGH, *Mayor.*

Attest. H. W. KING, *Recorder.*

Indorsed: "Presented November 24, 1862. J. E. HULL, *City Treasurer.*"

Another set of warrants were in the same form as the one above set out, and payable to M. P. Turner, or bearer, "out of any moneys in the WEST SIDE ROAD FUND, not otherwise appropriated."

Other warrants were in the same form, issued to different persons, payable "out of any moneys in the EAST SIDE ROAD FUND, not otherwise appropriated."

Other warrants were in the same form as the one above copied, payable out of the general fund, with this written indorsement across the printed blank on which they were issued; viz., "issued for scrip, surrendered and bearing six per cent interest, from January 17, 1860. H. W. KING, *Recorder.* Presented, January 14, 1863. J. E. HULL, *City Treasurer.*"

Various defenses were made, which, with the other questions arising upon this appeal, will be noticed in the opinion. Judgment in the District Court, passed for the plaintiff, partly upon demurrer and partly upon the verdict of a jury. The defendant is the appellant.

DILLON, J.—I. The plaintiff is the assignee of the orders or warrants in the suit. It is not alleged in the answer, nor was it shown on the trial, that he was not a *bona fide* holder of these instruments for value, and without notice of matters now pleaded as defenses thereto. It is claimed by the plaintiff that the warrants being signed by the proper officers of the city, authenticated by its corporate seal, and negotiated in form, he, as the innocent holder thereof, stands, like a similar holder of ordinary mercantile paper, free from and unaffected by the equities and defenses which the city set up in bar of his recovery.

This view of the law was the one adopted by the court below, in its rulings prior to and upon the trial. Thus, after stating the law applicable to the warrants issued for "scrip surrendered"—as to which more will presently be said—the court charged the jury as follows: "As to all the other warrants, they are negotiable, and there is no evidence tending to show that they were issued without authority or without consideration; all evidence of this kind having been excluded, because it was not shown, or offered to be shown, that the plaintiff had knowledge of such defenses; and if you believe from the evidence, that the warrants were issued by the defendant, and that plaintiff is the owner thereof, you will find for him as to all such warrants. So the bill of exceptions recites that "the defendant on the trial offered to show by the record of the proceedings of the city council that all of said warrants were issued *without any authority from the said city council*, and without any vote of said council authorizing the same," but this evidence the court refused to receive because the warrants were negotiable and there was no offer to show that the plaintiff took them with notice of such defect or irregularity.

This view of the law is, we think, erroneous. If my name

be signed to a promissory note by a person representing himself to be my agent, but "without any authority" from me, I am not bound; and I am no more bound because the obligation has been put in a negotiable form than if it has been put in a form not negotiable.

And the same rule must and does apply to paper purporting to be issued by the agents or officers of public or municipal corporations.

The general principle of law is well known and definitely settled, that the agents, officers, or even city council of a municipal corporation, cannot bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative and governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Everyone, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule; that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of *ultra vires*, that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract, or to do a given act in violation or excess of its corporate power and authority. The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited: *Mayor of Albany v. Cunliff* (city not liable for negligently building bridge under an *unconstitutional* statute), 2 Comst. (N. Y.), 165, 1849; reversing, s. c., 2 Barb., 190; *Cuyler v. Trustees of Rochester* (laying out street contrary to charter), 12 Wend., 165, 1834; *Hodges v. Buffalo* (4th July appropriation), 2 Denio, 110, 1846; *Halstead v. The Mayor*, 3 Comst., 430, 1850; *Martin v. The Mayor*, 1 Hill, 545; *Boone v. Utica*, 2 Barb., 104; *Cornell*

v. Guilford, 1 Denio, 510; *Boyland v. The Mayor and Aldermen of New York*, 1 Sandf. (N. Y.), 27, 1847; *Dill v. Wareham*, 7 Metc., 438, 1844; *Vincent v. Nantucket*, 12 Cush., 103, 105, 1858, per MERRICK, J.; *Stetson v. Kempton*, 13 Mass., 272; *Parsons v. Inhabitants of Goshen*, 11 Pick., 396; *Wood v. Inhabitants of Lynn*, 1 Allen (Mass.), 108, 1861; *Spalding v. Lowell*, 23 Pick., 71; *Mitchell v. Rockland*, 45 Me., 496, 1858; s. c., 41 Id., 363; *Anthony v. Adams*, 1 Metc. (Mass.), 284, 1840; *Western College v. Cleveland*, 12 Ohio, 375, 1861; *Commissioners v. Cox*, 6 Ind., 403, 1855; *The Inhabitants v. Weir*, 9 Id., 224, 1857; *Smead v. The Indianapolis, Pittsburgh and Cleveland Railroad Co.*, 11 Id., 104, 1858; *Brady v. The Mayor*, 20 N. Y. (6 Smith), 312; *Appleby v. The Mayor, etc.*, 15 How. Pr., 428; *Estep v. Keokuk County*, 18 Iowa, 199, and cases cited by COLE, J.; *Clark v. Polk County, infra.* [19 Iowa, 248.]

Negotiability will not validate obligations which are not binding, because of a *want of power* to issue them. *Gould v. Sterling* (action on loan bonds), 23 (N. Y.), 464; s. c., 1 Am. Law Reg. (N. S.), 290; and note of Prof. Dwight thereon, a portion of whose remarks are so strikingly in point that we quote them: "It seems entirely clear," he observes (Id., p. 297), "that no representation by an agent can even establish the fact of agency. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principal is concerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term 'negotiability' pre-supposes the existence of an instrument made by a person having *capacity or power* to contract in that particular manner." (*S. P. Hull & Argalls v. Marshall Co.*, 12 Iowa, 142, 162, per LOWE, J.) In *Starin v. Genoa*, and *Gould v. Sterling*, 23 N. Y., 452, 464, the plaintiffs were *bona fide* holders, for value, of negotiable bonds, and the Court of Appeals of New York held that they were bound to inquire into the power to issue them. "One who takes a negotiable note or bill of exchange purporting to be made by an agent," says Mr. Justice SELDEN (Id., 464), "is bound to inquire as to the

power of the agent." Analyzing in the case at bar the view of the court below, it will be found to involve three several distinct propositions:

1st. That the warrants in suit are *negotiable* paper. 2d. That the officers of the city (mayor and recorder) or at all events the city council, has power to create and issue negotiable paper; and, 3d. That warrants, like the ones in question, are valid in the hands of an innocent holder, even if issued without authority or without consideration. With reference to this, as well as other portions of the record, it is necessary to examine the propositions.

(*a*) The orders in suit are not bills of exchange, as a bill of exchange proper involves the idea of at least two distinct parties, drawer and drawee. The instruments in suit are orders by the city on itself—mere direction to the treasurer to pay the amount to the bearer. In legal effect they are the promissory note of the city. (*Miller v. Thomson*, 3 Man &. Gr., 576; followed, *Fairchild v. The Ogdensburgh, Clayton and Rome Railroad Company*, 15 N. Y., 337; *Bull v. Sims*, 23 Id., 570, 572; *Clark v. Polk County*, *infra*. [19 Iowa, 248.] And by usage and statute (Rev., Ch. 73) they pass by delivery, and the holder, as the real owner, may bring suit upon them in his own name. (*Steel v. Davis County*, 2 G. Greene, 469; *Brown v. Johnson County*, 1 Id., 486; *Campbell v. Polk County*, 3 Iowa, 467.) The debtor corporation may give a written acknowledgement of the debt. It may make this run to order or bearer without invalidating it; but it does not follow, as we shall show, that there is an implied power to invest these with all the qualities of commercial paper.

(*b*) There is further involved, in the view of the District Court, the propoistion that it is competent for the city officers (mayor and recorder) to issue its obligation in a *negotiable form*, and endow them with all the attributies of negotiable mercantile securities. Upon examining the charter under which these warrants were issued (Laws 1857, Ch. 185, p. 281), no *express* power to issue promissory notes or other negotiable paper is conferred. If the power exists to

make paper, which, in the hands of a *bona fide* holder, cuts off equities, it must be an *implied* power.

It is a familiar and elementary principle that municipal corporations have and can exercise such powers, and *such* only, as are expressly granted, and such incidental ones as are necessary to make those powers available and essential to effectuate the purposes of the corporation, and these powers are strictly construed. (2 Kent Com., 298; *Mayor v. Cunliff*, *supra*, and the authorities cited in connection therewith.)

It is held that banking and trading corporations have the implied or incidental power to make negotiable paper. (*McCullough v. Moss*, 5 Denio, 567; *Straus v. Eagle Insurance Company*, 5 Ohio, 59, 1855; *Mott v. Hicks*, 1 Cow., 513; *Attorney-General v. Life & Fire Insurance Company*, 9 Paige, 470; 2 Kent Com., 299; 1 Pars. N. and B., 165.) And the same rule has in some cases been applied, without much consideration, by way of analogy to municipal and public corporations; but not so as to cut off inquiry into the validity of the paper or just defenses. (*Kelly v. The Mayor, etc.*, 4 Hill, 263; see *Chemung Canal Bank v. Supervisors, etc.*, 5 Denio, 517; *Carne v. Brigham*, 39 Maine, 39; *Clarke v. School District*, 3 R. I., 199.) To this doctrine, as applied to commercial corporations, we see no objection; but we do see many and serious objections to treating the ordinary warrants of counties and cities as possessing all of the incidents and qualities of commercial paper.

These warrants are unlike bonds issued on time, negotiable in form, and for sale in the market, as, for example, those issued by towns, cities and counties to railroad companies, under express acts of the legislature (for they cannot be issued without *express* legislative authorization), in payment for stock subscribed. This class of securities are made and issued for the express purpose of raising money by their sale, and the attainment of this object would be embarrassed or defeated if they were subject to equities in the hands of *bona fide* purchasers. They are, therefore, held to be negotiable with all the incidents of negotiability. (*Clapp v. Cedar County*, 5 Iowa, 15; *Morris Canal Company v. Fisher*, 1 Stock., Ch., 667, 1855; s. c., 3 Am. Law Reg. (o. s.), 423; *Gelpcke v.*

Dubuque, 1 Wall. (U. S.), 175; *Craig v. Vicksburg*, 31 Miss., 216; *Jackson v. Railroad Company*, 2 Am. Law Reg. (N. S.), 585; S. C., Id., 748, and note of Judge REDFIELD; *Chapin v. Massachusetts and Vermont Railroad Company*, 8 Gray, 575; *Clark v. Janesville*, 10 Wis., 136; *Maddox v. Graham*, 2 Metc. (Ky.), 56; *Gould v. Sterling, supra; White v. Railroad Company*, 21 How., 575; Id., 539; *Bank v. The New York and New Haven Railroad Company*, 3 Kern., 599; S. C., 4 Duer, 480.)

But with warrants like those in suit it is entirely different. Under the charter of the city (§ 18) it is made "the duty of the city council to liquidate and settle all claims and demands against the city." And by the same section it is provided that no money shall be drawn from the city treasury "except by order under the authority of the city council."

The city council audit and allow claims and demands, and their action in this regard is to be entered of record. (Charter, § 3.) Upon a certified copy of these proceedings the treasurer of the city would be authorized to pay the claimant.

But by usage, or, perhaps, under a by-law, orders like those before us are drawn upon the treasurer. This mode is adopted for convenience, and these instruments are not to be assimilated, in all respects, to ordinary commercial paper.

On this question the argument may be thus condensed:

There is no express authority to the officers of this city to issue negotiable paper which shall be free from equities in the hands of purchasers. And the existence of such a power is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, and would be attended with abuse and fraught with danger. It should not, therefore, be held to exist as an *implied* power. (*Smith v. Cheshire*, 13 Gray (Mass.), 318, 1859; *Inhab. etc., v. Weir*, 9 Ind., 224, 1857; *Halstead v. The Mayor, etc.*, and other cases cited, *supra*.) Whether the *corporation defendant* could *specially confer* power upon its officers to bind it to negotiable paper, which should be free from equities, is a question which the record does not require to be decided.

(*c*.) It is further involved in the view of the District Court, that an innocent holder of one of these warrants may recover

thereon, though it be issued without consideration or without authority. The unsoundness of this view we have already pointed out. The warrants purport to be issued by the agents of the city. The plaintiff, in taking these warrants, was bound, at his peril, to ascertain the nature and extent of the power of these officers and of the city corporation. (*Delafield v. State of Illinois*, 2 Hill, 159, 174; 26 Wend., 192; s. c., 8 Paige, 53; *Hodges v. Buffalo*, 2 Denio, 110; *Supervisors v. Bates*, 17 N. Y., 242; *Overseers v. Overseers of Pharsalia*, 15 Id., 341; *Butterfield v. Inhabitants of Melrose*, 6 Allen, 187; *Rossire v. City of Boston*, 4 Id., 57; *Zabriskie v. Cleveland, Columbus and Cincinnati R. R. Co.*, 23 How., 381, 398.)

By examination he may find that these warrants cannot lawfully be issued without the order of the city council. This must be entered of record "on the journals of the city, which shall be open" (so the charter declares), "to the inspection and examination of every citizen." A warrant issued by the mayor and recorder without the previous order of the council is void. They have no authority to do it, it would be substantially a forgery. A purchaser of such a warrant is bound, at his peril, at least to ascertain that the claim upon which it is founded has been liquidated and settled by the council. A representation by municipal officers that this has been done (and the issue of such a warrant is in substance such a representation), will not be binding upon the corporation. Why? The answer is because an agent can neither create nor enlarge his powers by his unauthorized representations. The law on this subject has of late years been much investigated, and will be found discussed and examined in a most critical, able and exhaustive manner, in the following important cases: *Mechanics' Bank v. New York and New Haven R. R. Co.* (Schuyler Frauds), 13 N. Y., 599, 1856; *Farmers' Bank v. Butchers' and Drovers' Bank* (where teller without *real* but with *apparent* power, certified negotiable checks as good), 14 N. Y., 623, s. c., 16 N. Y., 125; *Claflin v. The Farmers' and Citizens' Bank, etc.*, 25 N. Y., 293; s. c., 2 Am. Law Reg. (N. S.), 92, and note; *Gould v. Sterling, supra;* the two last distinguished from the case in 14 N. Y., 623; *Griswold v. Havens*, 25 N. Y., 595, 1862; 26 N. Y., 505. Now without entering into these inter-

esting discussions respecting liabilities of principals *in certain cases*, for the acts of agents *apparently* but not *really* within the scope of their commission, we need only observe that if it be conceded that the mayor and recorder had the *apparent* power to issue warrants like the ones in suit, still if they did not *really* have this authority, their representations that they possessed it would not be the representations of a fact which from its nature (as in the case of the teller who certified the checks), rested *peculiarly* within the knowledge of the agent. On the contrary, the charter and the journals of the corporation, open to public inspection, afford to every person the certain means of ascertaining the existence of the authority of these officers to issue the warrants.

We have been able, after a very thorough investigation, to find no case which holds that city and county warrants, like those before us, are freed from equities when in the hands of *bona fide* holders. Nor has the plaintiff's counsel called our attention to any such. On the other hand, we have found several cases in the different States expressly holding that such orders were not commercial paper in the hands of an innocent holder, so as to exclude evidence of legality of their issue or preclude defenses thereto. See *Halstead v. The Mayor, etc., of New York* (on audited city warrants like those in suit), 5 Barb., 218, 1849; s. c., affirmed in Court of Appeals, but where the rights of a *bona fide* holder were not passed on, 3 Comst., 430, 1850; *People v. El Dorado County* (on audited county warrants distinctly holding that *bona fide* stood in shoes of payees), 11 Cal., 170, 1858; s. p., *Sturtevant v. Liberty* (town orders), 46 Maine, 457; *Smith v. Inhabitants of Cheshire*, 13 Gray (Mass.), 318, 1859; *Andover v. Grafton* (on note made by town), 7 N. H., 298, 1834; *Sanborn v. Deerfield*, 2 Id., 251, 254; *Dalrymple v. Whittingham*, 26 Vt. (4 Deane), 345; *Inhabitants v. Weir*, 9 Ind., 224, 1857; *School District v. Thompson*, 5 Minn., 280, 1861, approving 5 Barb., 218; *Clark v. Polk County, infra* [19 Iowa, 248], and cases cited by COLE, J.

It must not be supposed that certain cases recently decided by the Supreme Court of the United States have escaped attention. These cases were brought upon negotiable county

and city *bonds*, and where there was *express* power to issue them. (*Commissioners of Knox County v. Aspinwall*, 21 How., 539, 544; approved and followed in *Bissell v. Jeffersonville*, 24 Id., 287, 1860; and *Gelpcke v. Dubuque*, 1 Wallace, 203.)

In the latter case, speaking of the express power of the *City of Dubuque* to issue the bonds sued on, Judge SWAYNE, following *Knox County v. Aspinwall*, laid down this rule: "When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any commercial paper."

Upon this, without calling in question its correctness in the particular case in which it was used, we remark: 1. That this language was employed in a case where there was *express specific power*, on the part of the city, to issue *negotiable bonds*, and in that respect is distinguishable from the case before us. 2. Experienced jurists, conscious of difficulty and danger attending it, hesitate to lay down general and unqualified rules professing to embrace all cases. Attempts of this character generally prove unsuccessful. With due deference, the language above quoted is susceptible of being taken to assert a doctrine which, without reasonable limitations, cannot be true as respects public and municipal corporations. Suppose a city charter expressly authorized the common council to issue negotiable securities for corporate debts, and that the mayor and recorder, without an order of the council, fabricate—manufacture such securities, and that they find their way into the hands of innocent purchasers. It cannot be that Judge SWAYNE means that "the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority," and yet he says so.

The true rule is, that the want of corporate power, or the want of authority in the municipal officers, cannot be supplied by their unauthorized acts or representations. (*Gould v. Town of Sterling, supra; Treadwell v. Commissioners*, 11 Ohio,

183, commenting on and criticising *Knox County v. Aspinwall*, 21 How., 539.)

Any other doctrine nullifies the limitations and checks contained in the charter for the protection of the corporators, and needlessly invests the public officers and agents with the power successfully to "*Schuylerize*" our public corporations, without limit and without remedy. Whether warrants, like those in suit, issued by order of the council, but which order was based upon the allowance of a claim for which the city was not legally liable, would, in the hands of a *bona fide* holder, be free from equities, is a question of great difficulty, and one which we pass, because not necessary to be now decided. It will be discussed and decided in some of the authorities before referred to.

II. For answer to the third count in the petition, the city says "that the warrant therein set out was executed to Keyes and Crawford, the payees thereof, in satisfaction of a judgment held and owned by them against the city, at the rate of one dollar in warrants for each seventy-five cents due on said judgment; that the city council thereby exceeded their authority, and the said warrant thus issued is illegal, usurious and void."

To this defense the court sustained the plaintiff's demurrer, and the defendant excepted and abided by his answer. The legal sufficiency of this defense is one of the questions presented in this appeal. For forbearance or "giving day of payment," a creditor under our statute of usury cannot lawfully receive or contract to receive more than ten per cent interest.

If I purposely and knowingly give my note for $100 payable on demand in satisfaction of a debt or judgment for only $75, it is *prima facie*, and perhaps conclusively, usurious. And so it is if the same be done by a corporation. Besides, it may well be doubted whether the corporation is bound by the action of its council, in agreeing to pay a sum clearly, distinctly and ascertainably greater than is legally due. Courts hold a stiff reign on corporate allowances; and auditing officers cannot, in general, if ever, allow and pay claims, however meritorious, if they are not legally chargeable. (*People v. Stout*, 23 Barb., 349; *People v. Lawrence*, 6 Hill, 244, 1843; Id.,

463; *Chemung Canal Bank v. Supervisors*, 5 Denio, 517, 521, 1848; *Halstead v. The Mayor, etc.*, 5 Barb., 218; s. c., 3 Comst., 430; *Lake v. Trustees of Williamsburg*, 4 Denio, 520; *Supervisors v. Briggs*, 2 Id., 26; s. c., 2 Hill, 135; *Augusta v. Leadbetter*, 16 Maine, 45; compare *Bean v. Jay*, 23 Id., 117, 121; and see, also, *Campbell v. Polk Co.*, 3 Iowa, 467.)

The defense pleaded was good *pro tanto*, and the demurrer should have been overruled instead of sustained.

III. For answer to various other counts in the petition the defendant pleads, in substance, that they are drawn "*on the West Side road fund*, and are to be paid out of funds raised by taxation in the West Side road district, and not out of the general fund of said city;" that there has been, and is no money in the treasury belonging to said West Side road fund; that said warrants are improperly joined in this suit with warrants payable out of the general fund, and with those payable out of the *East Side* road fund. In further defense to certain warrants the defendant alleges "that they were issued and loaned to M. P. Turner, the payee thereof, by the city council of Des Moines, to aid him (Turner) in constructing a toll-bridge across the Raccoon River, near its mouth, in the corporate limits of said city; that the city council had no authority (in law) to make such contract with Turner, wherefore said warrants are without consideration and void."

To this defense the plaintiff demurred; the demurrer was sustained and the defendant excepting, stood upon it. Other questions made on this appeal relate to the sufficiency of these defenses. The same defense, *i. e.*, improper joinder and want of funds, was pleaded to the warrants drawn upon the *East Side* road fund, together with the following special defense; viz., "The said warrants were issued to one George Johnson, under and by virtue of a pretended contract by and between the street committee on the East Side of Des Moines and said Johnson, for building a sidewalk on the East Side, in said city; that the street committee had no authority to make such contract and authorize the building of said walk; that the same was wholly without authority of law,

and void, and the warrants issued thereunder without consideration, and void."

(*a*) The plaintiff's demurrer to this answer was sustained, and defendant excepted and refused to answer over. This ruling is also assigned as error.

The questions here made may be considered together. It is claimed by the city that the warrants issued for road purposes are payable out of a "particular fund," and that the obligation to pay depends upon the existence and the sufficiency of the special fund; that being thus payable, they are not negotiable; that the city is only trustee for the East and West Side road funds, and the two classes of warrants cannot be sued upon in one and the same action.

If these warrants are not payable out of a particular fund; or, in other words, if the city is liable thereon, irrespective of the fact whether there is or is not a road fund on hand and in the treasury, this disposes of all the claims above stated as being made by the city.

By section 23 of the charter the "city" (Des Moines) "is hereby constituted a road district." By section 27 it is provided: "That all property and road poll-tax due from persons within the corporate limits, shall be paid into the city treasury; that there shall be two road districts, East and West Side, a street commissioner in each (appointed by the city council, section 4), under whose supervision all moneys collected for street and road purposes shall be expended: *Provided*, all moneys so collected shall be expended in the districts where they are levied or may fall due." Taking all the provisions of the charter together, it is plain that the care of roads and streets is a corporate matter. The corporation has charge of all streets and roads, and it, and it alone, levies and collects the taxes to defray the expenses of making and keeping them in order. *All of these taxes go into its treasury.* All charges of this character are payable out of it. While there is to be a street commissioner on each side, he is subject to the control of the council. It is the council that determines the extent of the expenditures or indebtedness for road purposes. The effect of the proviso in section 23, *supra*, is simply to prevent the council from expending in the West Side money and taxes

collected for road purposes in the East Side, and *vice versa*. It would hence result that a "road account" should be kept by the officers of the city with each side: Each side to be credited with what has been received from it, and debited with what has been paid out on its account. There is nothing in the charter which favors the notion that the liability of the city for road debts is conditioned upon the existence of road funds in the treasury. For road debts the city is as absolutely and unconditionally liable as for any other debts. This liability cannot be controlled or varied by the form in which warrants may be drawn or worded by the municipal officers. (*County Commissioners v. Cox*, 6 Ind., 403, 1855; and authorities cited, *infra*.)

We therefore hold, that the reference in the orders to the East and West Side road funds is not to express the idea that the obligation to pay is dependent upon a fund *in esse*, at the time of demand or suit brought, but to enable the officers of the city to keep the account above suggested. This is a matter which does not concern creditors who look alone to the city.

The officers of the city will have no difficulty, after judgment, in ascertaining, by an inspection of the warrants, how much to charge to the East Side and how much to the West Side road account or fund.

This view is entirely consistent with all, and is directly sustained by many of the following authorities: *Kelly v. The Mayor, etc.*, 4 Hill, 263; *Lake v. Trustee*, 4 Denio, 520, 1847; *Bull v. Sims*, 23 N. Y., 570; *Fairchild v. Ogdensburg, Clayton & Rome R. R. Co.*, 15 Id., 337; *Bank of Kentucky v. Saunders & Wier*, 3 A. K. Marsh., 184; *Commissioners v. Mason*, 9 Ind., 97; *Bayergul v. San Francisco*, 1 McAll. C. C. (Cal.), 175; *Campbell v. Polk Co.*, 3 Iowa, 467; *Pease v. Cornish*, 19 Me., 191; Edwards on Bills, 143, distinguishing (which is here applicable) "between bills drawn payable out of a particular fund and those that are simply *chargeable to a particular account*." Chit. on Bills, 138; Story on Notes, §§ 25, 26.

It is also set up in bar of recovery on certain warrants, payable to Turner, that they "were issued and *loaned* to aid him

in constructing a toll-bridge across the Raccoon River, in the corporate limits of the city." This is the substance of the answer in this respect. No person or corporation can erect a toll-bridge and levy and collect tolls any more than a person or corporation can set up a ferry and levy and collect ferriage, unless this be authorized by the law of the State. (De Jure Maris, Ch. II; Id., Ch. III), where Sir MATHEW HALE says: "No man can take a settled or constant toll, even in his own private land, for common passage, without the king's license." 4 Am. Law Reg. (N. S.), 513, and authorities there cited; *Prosser v. Wapello Co.*, 18 Iowa, 327; *Mullarky v. Cedar Falls, ante.* . How Turner obtained authority to erect a toll-bridge within the corporate limits of the city, does not appear. The authority may, as in the Cedar Falls case just cited, antedate the corporate organization of the city. Whether under the statute it can be conferred by the county authorities within the limits, and upon the streets of the city, we need not stop to inquire. We will assume, on the averments, that Turner had the lawful power to erect the bridge. The city of Des Moines, under its charter, possessed no power to erect such a bridge for itself and by itself. (*Mullarky v. Cedar Falls, supra.*) Nor would it have the power to erect such a bridge jointly with an individual, or to appropriate funds of the city in aid of such a private enterprise.

The power of the city (charter, § 14) "to improve sidewalks, alleys and streets," "to make by-laws necessary and proper for the good regulation, safety and health of the city," would not authorize it to erect or aid in the erection of a toll-bridge by a loan of the corporate credit.

Turner's bridge was, it would appear, essentially an individual enterprise. Let it be granted that, if erected, the bridge would be of advantage to the city by facilitating the intercourse of citizens residing on different sides of the river. So the erection of an elevator or of a private market-house might be beneficial to the city. But would this justify the city in issuing its warrants, and *loaning* them to a private individual, to aid him in erecting the elevator or private market-house? No instance occurs to us in which it would be competent for the city to loan its credit, or make its accommodation paper for

the benefit of citizens, to enable them to execute private enterprises. (1 Pars. Notes and Bills, 166; *Smead v. Indianapolis, Pittsburgh & Cleveland R. R. Co.*, 11 Ind., 105.)

To recognize such a right would be to break down, to a great extent, the checks and limitations on the power of the corporation—checks and limitations designed to protect and secure the inhabitants against the dangers of speculative and extra municipal projects. Though the averments are not very full and specific, the answer sets up that the warrants were *loaned* to Turner to aid him in building a toll-bridge for himself, and this, *prima facie* at least, is in excess of the corporate authority of the city. If the bridge was already erected on one of the streets of the city, if Turner, by law, had the right to exact tolls from the citizens, we will not say that the corporation would not be authorized to make, among other agreements that might be imagined, an arrangement whereby its citizens might pass free from tolls, and issue its warrants in payment for the privileges thus acquired. No such case is presented. We decide only that it cannot *loan* its credit or paper to aid an individual in constructing a toll-bridge, or to aid any other scheme essentially private. To prevent municipal corporations from engaging in banking and speculative enterprises, it is necessary, as this case shows, and as the current history of these bodies have demonstrated, to keep the corporate wings clipped down to the legal standard. The court erred in sustaining the demurrer to this part of the answer.

(*c.*) As to the warrants issued to Johnson, different considerations apply. Building sidewalks is, under the charter, a legitimate municipal object. Why the street committee had no authority in law to make such a contract, is not alleged. The ruling of the District Court on this point is affirmed.

IV. Certain of the warrants in suit purport on their face to have been issued "for city scrip surrendered." The city pleaded that the scrip thus surrendered and which constituted the consideration of these warrants, was issued in violation of Art. 5 of the old constitution, and Chap. 147 of the Code of 1851—being intended to circulate as money.

To this the plaintiff responds, in substance, that the scrip

itself was issued by the city, and used by it to redeem city warrants founded upon a valuable consideration.

It appeared on the trial that in 1857 the city council passed an ordinance reciting: "the present scarcity of money," "the impossibility of collecting taxes," the "impolicy of paying interest on loans," and the policy of issuing "for general circulation, convenient warrants" that tax-payers might become enabled to pay their taxes, and providing for the issue of engraved city warrants in denominations of $1, $2, $3 and $5. In phraseology the warrants thus issued are like those now in suit. In appearance they are like bank bills, being on bank note paper, with vignette, etc.

This scrip the treasurer was authorized to receive for taxes and to exchange for outstanding city warrants drawn in the usual form. The evidence does not show that any scrip was issued by the city, except to pay city indebtedness, or in exchange for their outstanding evidences of city debt. The "scrip" was for a time popular, and, as invited by the city, its creditors received it in payment or in exchange for other evidences of municipal liability. Time wore on; the scrip would seem to have declined in popular favor, and not to have realized the high anticipations which its emission had inspired. Empirical, if not illegal, the remedy did not cure or relieve the corporate ills recited in the ordinance to exist. So in 1860 the council "changed its base." In 1857 it asked warrant holders to exchange them for scrip. They did so. In 1860 it authorized "the issue of city orders for the redemption of city scrip." Scrip holders, conforming to the wishes of the city, then surrendered scrip and received warrants, such as those in suit, and such as those which they had given up to the city when they received the scrip.

On this part of the case the court charged that the scrip was illegal, and so far the defendant does not complain; but it further directed the jury, in substance, that if the city owed a valid and admitted debt, paid it in scrip, and then took up the scrip by issuing the warrants in question, the law regards this as a settlement of the transaction, and the warrants would be supported by a sufficient consideration and be valid and binding. The jury so found the fact to be, and the evidence

fully sustains the finding. Under the circumstances, this defense is entitled to no favor. Unless corporations are exempt from the ordinary principles of fair dealing that apply between man and man, this defense has no just foundation. It is the duty of courts not to allow the honest and just merits of a cause to be entangled in the meshes of sophistical reasoning, and rules purely technical. Not a member of the city council would, we are persuaded, make such a defense for himself. We have multiplied and constantly recurring examples of the fact, that under the shield of their corporate character men daily do acts which they would never do as individuals. Nor are these examples confined to this side of the Atlantic. "It is a familiar fact," says Mr. HERBERT SPENCER, "that the corporate conscience is ever inferior to the individual conscience; that a body of men will commit, as a joint act, that which every individual of them would shrink from did he feel personally responsible." (Essays No. VII, p. 261, Am. Ed., 1865; and see Id., Essay V, for description, perhaps too highly colored, of the workings of English reformed municipal corporations.)

That the charge of the District Court was correct, even conceding the scrip to be illegal, we have no doubt. (See *Mullarky v. Cedar Falls*, June Term, 1865; *Allegheny City v. McClurkan*, 14 Pa., 81, 1850; *Early v. Mahan*, 19 Johns., 147.)

V. The warrants being set out in the petition by copy, and not being denied under oath, it was not error for the court to admit them in evidence, without proof of the signature, or of the authority to issue the same. These warrants are in the nature of notes, and are within the provisions of the statute. (Acts 1862, Ch. 28, p. 30.) The signatures thereto and seal of the corporation being thus admitted to be genuine, we are of the opinion that it is not necessary in this State that the plaintiff shall show, as a condition of being allowed to read the warrants in evidence, that these officers had the authority from the council to sign and issue them. It is not necessary to inquire whether proof *aliunde* of the city treasurer's indorsement of the "presentation" of the warrants is necessary, or whether the indorsement of that fact by the treasurer is an

"indorsement thereon" within the meaning of the statute last cited, because the fact of presentation was, by being alleged and not denied, admitted on the record. (See, however, *Clark v. Polk County*, *infra* [19 Iowa, 248].) The ruling of the District Court on these points is affirmed. Because the court below, on the trial, refused to allow the city to show that the warrants, respecting which a jury trial was had, were issued without authority, the judgment of that court on the verdict for $1,789.30 is reversed, and as to these warrants, and the warrants issued to Keyes and Crawford, and issued to Turner, a trial *de novo* is ordered. The judgment of the District Court in the plaintiff's favor, on demurrer, for $2,632 is affirmed, less the amount of the Keyes and Crawford and Turner warrants. The District Court will ascertain the amount thus to be deducted and credit the same on the judgment for $2,632, or set it aside and render a new judgment for the sum that remains after making the deduction above directed.

COUNTY BONDS ISSUED WITHOUT AUTHORITY, VOID IN THE HANDS EVEN OF AN INNOCENT HOLDER.

TWENTY-FIFTH SELECTED CASE.

MARSH v. FULTON COUNTY.*

1. In February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the legislature of Illinois, and authorized to construct a railroad from Warsaw, on the Mississippi River, to the east line of the State. In February, 1857, an act was passed by that legislature amending the charter of the company, by which the line of the railroad was divided into three divisions, designated as the Western, the Central, and the Eastern, and each division was created a new company; so that there were three distinct corporations in place of the original corporation: *Held*, that a subscription of stock and issue of county bonds, authorized upon a vote of the people of the county to the original corporation, could not be legally made to one of the three new corporations.

*Reported in 10 Wall., 676 (1870).

2. Where county bonds to a railroad company are issued without any authority, they are invalid in the hands of an innocent purchaser. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder.

3. A ratification being in its effect upon the act of an agent equivalent to the possession by him of a previous authority, and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally, can only be made when the party ratifying possesses the power to perform the act ratified. Accordingly, where supervisors of a county possessed no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they could not ratify a subscription to the company already made without such authorization.

Error to the Circuit Court for the Southern District of Illinois.

THIS case was thus:

In 1849 the legislature of the State of Illinois passed an act, which provided that whenever the citizens of any city or county in that State were desirous that such city or county should subscribe for stock in any railroad company already organized or incorporated, or thereafter to be organized or incorporated under any law of the State, such city or county might and were authorized to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000 for each of such cities or counties; but that no subscription should be made, or purchase or bond issued under the provisions of the act, whereby any debt should be created, unless a majority of the qualified voters of such county or city should vote for the same. The act also required that the notices calling for the election should *specify the company in which stock was proposed to be subscribed.*

A law of the State of 1861 provided that the powers of a county in Illinois could only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted. (Gross' Statutes of Illinois, 751.)

In February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the legislature of Illinois, and authorized to construct a railroad from Warsaw, on the Mississippi River, to the east line of the State.

In September, 1853, the board of supervisors of Fulton county, through which county the projected line of the road was to run, ordered that the question be submitted to the voters of the county, at the ensuing November election, whether the county should subscribe $75,000 to the capital stock of this company, and a like sum to the capital stock of the Petersburg and Springfield Railroad Company, payable in the bonds of the county; such bonds not to be issued to the former company until its secretary should certify to the board that $700,000 had been subscribed to its stock and 5 per cent thereon had been paid. At the election mentioned the vote was taken, and a majority of the votes of the county was cast in favor of the subscription.

In April, 1854, the board ordered its clerk to subscribe the $75,000 voted to the Mississippi and Wabash Company, and to issue the bonds when it should be certified to him by the secretary of the company that $700,000 of the stock had been subscribed and five per cent thereon had been paid.

In September, 1855, a similar order was made by the board, requiring its clerk to enter the subscription on the books of the company in the name of the county of Fulton.

In February, 1857, an act was passed by the legislature of Illinois, amending the charter of the Mississippi and Wabash Company, by which the line of the railroad was divided into three divisions, designated the Western, the Central and the Eastern divisions, and each division was placed under the management and control of a board of three commissioners, to be elected by the stockholders of the division, and to be invested with all the powers of the original board of directors of the company over the road in their division.

In April, 1857, the stockholders within the Central Division elected commissioners of the division, who thenceforth until December, 1868, exercised all the powers conferred by this amendatory act.

On the books of the Central Division thus organized the clerk of the county court of Fulton county, acting as clerk of the board of supervisors of that county, made the subscription of $75,000 in the name of the county, and in September following issued to this division the fifteen bonds which are in

suit in this cause. These bonds purport to be obligations of the county of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, and pledge the faith of the county and its property, revenue, and resources for their payment.

The following is a copy of a bond and coupon:

"No. 11. $500.

"UNITED STATES OF AMERICA,

"STATE OF ILLINOIS, COUNTY OF FULTON.

"Bond due in ten years after date.—Central Division, Mississippi and Wabash Railroad Company.

"Know all men by these presents, That there is due from the county of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, OR BEARER, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent per annum, payable annually on the first day of July in each year, at the treasury of said county of Fulton, on the presentation and surrender of the annexed coupons. The principal to be due and payable ten years from the date hereof. For the performance of all which the faith of the said county of Fulton is irrevocably pledged, as also the property, revenue and resources of said county of Fulton.

"In testimony whereof, John H. Peirsol, Clerk of the County Court, has hereunto subscribed his name and affixed the common seal of said county court, this first day of September, 1857.

"JOHN H. PEIRSOL,

"[L. S.] *Clerk of the County Court.*"

"BOND No. 11. $35.

"STATE OF ILLINOIS.

"The county of Fulton will pay thirty-five dollars on this coupon on the first day of July, 1859, at the treasury of said county.

"JOHN H. PEIRSOL,

"*Clerk of the County Court.*"

There were various acts of the board of supervisors of Fulton county, done after the issue of these bonds, which tended to show that the board recognized them and considered the county bound for them.

Interest was on one occasion paid on some of the bonds by the county treasurer, and the amount paid was allowed to him by the board in settlement.

The records of the board, held on the 15th of September, 1857, showed the adoption of a report of the finance committee, estimating the amount required to pay the interest on bonds, "issued and to be issued" that year, including county expenses and interest on railroad bonds, and levying a tax to pay the same, with no reservation or exception as to these bonds.

At the same session the board appointed county agents as to this railroad, and required *them to attend the meetings of stockholders, election of officers*, and to represent the county "as a stockholder." The clerk issued certificates of appointment to the county agents and they were paid by the county for their services. At the session of March, 1858, the board appointed a fiscal agent to manage the sinking fund on "railroad bonds;" and in the following September appointed a committee to estimate the amount of money for the current year required to pay interest on county bonds "issued for railroad purposes." The committee reported that $350 was needed to pay interest on $4,500 of these bonds.

At the session of March, 1858, it was ordered that the claim of Graham, one of the agents of the county as to the Mississippi and Wabash Railroad Company, for services as such agent, be paid; and at the September session, 1859, that the county treasurer pay "the interest on the Fulton bonds," and without any reservation of the bonds in suit, and at the September session, 1860, that the county treasurer pay all coupons presented prior to March, 1861, and from June, 1861, purchase as many bonds, at not exceeding sixty cents of the dollar, as the sinking fund would pay.

In September, 1865, the board paid two of the bonds at a discount, protesting, however, against liability upon them.

On the 13th of September, 1866, the board ordered payment

of two more of the bonds *in full* upon the recommendation of the finance committee, and their statement that "*they entertained no doubt that they ought to be paid*," and the bonds were surrendered.

On the next day, however, the board, by order, reconsidered the vote ordering payment, and finally refused to pay the bonds.

The present action was brought on fifteen bonds issued by the clerk of the County Court of Fulton county, acting as clerk of the board of supervisors of that county to the Central Division of the Mississippi and Wabash Railroad Company, and on the coupons annexed to said bonds.

The declaration contains special counts on the instruments, and also the common counts. The defendants pleaded the general issue, and judgment passed in their favor. The plaintiff below brought the case here on writ of error.

Mr. Justice Field delivered the opinion of the court.

The questions presented for our consideration are, *first*, whether the bonds issued by the clerk of the County Court of Fulton county to the Central Division of the Mississippi and Wabash Railroad Company were, at the time of their issue, valid obligations of the county of Fulton; and, *second*, if not thus valid, whether they have become obligatory upon the county by any subsequent ratification.

Were they valid when issued? The answer depends upon the law of Illinois then in force. The clerk of the County Court possessed no general authority to bind the county. He was a mere ministerial officer of the board of supervisors; and that body was equally destitute of authority in this particular, except as the law of Illinois gave it. That law authorized any county of the State, and, of course, its supervisors, who exercised the powers of the county, to subscribe stock to any railroad company in a sum not exceeding one hundred thousand dollars, and to pay for such subscription in its bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county at an election called for the expression of their wishes on the subject, and it

prohibited any subscription or the issue of any bonds for such subscription without such previous sanction. "No subscription shall be made or purchase bond issued by any county," says the law, "unless a majority of the qualified voters of such county * * * shall vote for the same." And the law further requires that the notices calling for the election "shall specify the company in which stock is proposed to be subscribed."

These provisions furnish the answer to the first question presented. The only subscription authorized by the voters of Fulton county was that to the Mississippi and Wabash Railroad Company, and one to the Petersburg and Springfield Company. The Central Division of the Mississippi and Wabash Railroad Company was a different corporation from the original company. It has been so held by the Supreme Court of Illinois in a case involving the consideration of a portion of the bonds in suit and the remaining sixty thousand dollars of bonds of the original subscription.

The amendatory act of 1857 dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire State, was voted by the electors of Fulton county; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the

instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd's Acceptances* (7 Wallace, 676). In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power must, at his peril, see that the paper on which he relies, comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authori-

zation. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition. (*McCracken v. City of San Fancisco*, 16 California, 624.)

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way.

We perceive no error in the record, and the judgment of the Circuit Court must, therefore, be

AFFIRMED.

APPLICATION OF THE DOCTRINE IN CASE OF MUINCIPAL RAILROAD BONDS.

TWENTY-SIXTH SELECTED CASE.

ALEXANDER BUCHANAN v. THE CITY OF LITCHFIELD, ILLINOIS.

1. The constitution of the State of Illinois, article nine, section twelve, which was adopted in 1870, provides that "no county, city, township, school-district, or other municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in an aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such

*Reported in 102 U. S., 278.

indebtedness." A statute of the State, approved April 15, 1873, authorized any city of the State to construct water-works, and for that purpose it was authorized to borrow money, and to levy and collect a tax in the manner that other municipal taxes might be levied and collected.

The City of Litchfield subsequently passed an ordinance authorizing and directing the issuing of the bonds to an amount not exceeding $50,000, to be used to borrow money for the erection, constructing, and maintenance of water-works for the city.

The city issued such bonds, which bore date January 1, 1874, in accordance with the city ordinance; each bond containing the statement that it was issued under authority of an act of the legislature of the State of Illinois, entitled "an act authorizing cities, incorporated towns and villages to construct and maintain water-works," which was approved April 15, 1873, and an ordinance of said city, entitled "an ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works, approved December 4, 1873."

The twelfth section of the constitution of Illinois was not referred to in the statute or the ordinance, and the ordinance does not refer to the indebtedness of the city, but it did appear that at the time of the issuance of the bonds the city indebtedness exceeded the limits fixed by the constitution.

Under these facts a *bona fide* holder brought suit upon unpaid coupons attached to bonds issued by the city as aforesaid, but it was held by the court that he was not entitled to recover.

2. The court held that inasmuch as neither the constitution nor the statute prescribed the mode by which a party dealing with the city could determine the amount of the city's indebtedness, it was a *quære* whether, if the bonds had contained recitals which could be interpreted as amounting to a representation by the official representatives of the city who executed the same; that the indebtedness then existing and that created by the bonds, did not exceed the limits fixed by the constitution, would constitute an *estoppel* against the city from setting up as a defense that such recital was untrue in fact.

3. It appeared in this case that there had been no assessment of the property within the city during the year preceding the execution of the bonds. But the court, in determining the question whether the city had exceeded the constitutional limitations in issuing the bonds, permitted the defendant, under objections, to introduce the assessments of a preceding year for State and county taxes of all the taxable property within the county and township within which the city was situated, and from which, in connection with a map, the location and taxable value of the property within the limits of the city could be determined, and this was held to be the best evidence which could be produced of the value of the assessable property, and proper evidence.

4. Whether the city could be compelled to refund the money which her authorized agents and officers had received on the bonds and paid into the treasury of the city, and which was expended in the construction of the water-works, was a question not properly before the court and was left undecided.

Error to the Circuit Court of the United States for the Southern District of Illinois.

THIS was an action of assumpsit, brought November 25, 1876, by Alexander Buchanan against the city of Litchfield, Illinois, to recover the amount of certain coupons of which it was admitted that he was the *bona fide* holder for value. The declaration, besides a count upon the coupons themselves, contains the usual counts for money lent and advanced, and for money had and received. The city defended the action upon the ground that the bonds were issued in violation of the constitution of the State, and that they were consequently void. The court which, by the stipulation of the parties, tried the issue found for the defendant, and the plaintiff sued out this writ.

The legislature of Illinois passed, April 15, 1873, an act entitled, "An act authorizing cities, incorporated towns, and villages to construct and maintain water-works," by the first section of which act it is provided that all cities, incorporated towns, and villages in this State be, and are hereby, authorized and shall have power to provide for a supply of water for the purpose of fire protection and for the use of the inhabitants of such cities, incorporated towns and villages by the erection, construction and maintaining of a system of water-works.

The second section provides that such cities, incorporated towns and villages may borrow money and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected for the erection, construction and maintaining of such water-works, and appropriate money for the same.

The city council, the legislative authority of the city, adopted December 4, 1873, an ordinance in the words following:

"An ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works.

"Be it ordained by the city council of the city of Litchfield:

"SECTION 1. That in accordance with the power conferred by section second of an act of the General Assembly of the State of Illinois, entitled, 'An act authorizing cities, incorporated towns and villages to construct and maintain water-works,' approved April 15, 1873, the mayor and city clerk are hereby authorized and instructed to issue not exceeding fifty thousand dollars in Litchfield water-bonds, which bonds shall be used for borrowing money for the execution, construction and maintaining of water-works for the use of the people of said city of Litchfield.

"SEC. 2. That the said Litchfield water-bonds shall be of the denomination of five hundred dollars each, shall be dated January 1, 1874, and shall become due twenty years after said date, but may be redeemed at par at any time after the year 1878, notice being given at the Nassau Bank, in the city of New York, six months in advance of the intention so to redeem, and said bonds shall bear interest at the rate of ten per centum per annum, payable semi-annually at the said Nassau Bank in the city of New York."

As required by the charter the mayor of the city approved this ordinance, and after its adoption he and the city clerk made one hundred bonds of the denomination of $500 each, as follows, differing in the numbering from 1 to 100 inclusive:

"No. —.] LITCHFIELD WATER-BOND. [$500.00

"CITY OF LITCHFIELD, STATE OF ILLINOIS.

"The city of Litchfield, in the State of Illinois, for value received, promises to pay to Geo. Wm. Ballou or bearer five hundred dollars, in current money of the United States, at the Nassau Bank in the city of New York, twenty years after date, with interest thereon from the date hereof at the rate of ten per centum per annum, which interest shall be payable semi-annually in current money of the United States on presentation at said bank of the coupons hereto annexed: *Provided*, That the said city of Litchfield shall have the right to pay off and redeem this bond at its par value at any time after

the year A. D. 1878, first giving said bank six months' notice in writing of the intention to so redeem.

"This bond is issued under authority of an act of the General Assembly of the State of Illinois, entitled, 'An act authorizing cities, incorporated towns and villages to construct and maintain water-works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield numbered 184, and entitled, 'An ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works,' approved December 4, 1873.

"In testimony whereof, the mayor of said city has hereunto set his hand and caused the corporate seal to be affixed, and the clerk of said city to countersign the same the first day of January, A. D. 1874.

"W. S. PALMER, *Mayor.*

"B. S. HOOD, *City Clerk.*"

Coupons for the semi-annual interest were attached to the bonds, and the whole number, amounting to $50,000, were sold by the city for the purposes for which they were authorized. The plaintiff's coupons were due July 1, 1876.

The defendant then proved, against the objection of the plaintiff, who insisted that such evidence was not admissible against him as the *bona fide* holder of the coupons, that the city of Litchfield is incorporated under a special law which defines its boundaries; that there was no assessment made of the taxable property within said city for the year 1873, separately, but that the city is within the limits of two municipal townships organized under the township organization laws of the State, one called North Litchfield, and the other South Litchfield, each six miles square, and that the taxable property in the city was assessed for State and county taxes in the township in which it was situated and to which it belonged; that the property of the city as assessed for State and county taxes for the year 1873 was $1,400,000, which valuation was ascertained by the following method:

The assessors of North and South Litchfield returned to the clerk of the county court the lists and value of the property assessed for taxation for the year 1873, in said townships re-

spectively, which lists contained a description of all the lands, lots, and other real estate in said township, with the proper valuation opposite each tract or lot. With these lists and the plat of the city before him the clerk was able to ascertain the description and value of all the real estate in the city, and by footing the value of the several lands and lots found within the city limits the aggregate value of all the real estate of the city was ascertained for the year 1873.

By another special law the city of Litchfield is made one school-district, called the Litchfield school-district. And it is a part of the legal duty of the township to note opposite the name of each owner of personal property assessed for taxation the school district in which he resides. That the assessors of North and South Litchfield for the year 1873, noted opposite the names of the owners of personal property in their township residing within the city limits that they resided in Litchfield school-district, and the assessed value of the personal property of the city of Litchfield was ascertained by computing the value of all the personal property assessed for taxation in the school-district.

That railroad property and the property of corporations were assessed by the State Board of Equalization, and the whole value of these species of property lying in Montgomery county (in which the city of Litchfield is situated) was certified by the auditor to the county clerk, and the proportion taxable in Litchfield was ascertained by the clerk.

That the assessment thus made by the town assessors of the town of North and South Litchfield was the only assessment made, or authorized by law to be made of the property situated in the city of Litchfield for State and county taxes for the year 1873, and which assessment for the purposes aforesaid was the last assessment for State and county taxes previous to the issuing and making of said bonds. That by compiling the assessments thus made the exact amount of the value of taxable property in said city of Litchfield for the year 1873, as assessed for State and county taxes, should be and is ascertained to be the said sum of $1,400,000.

It was proved that the debt of the city of Litchfield on and

before the first day of January, 1874, exclusive of the water-bonds, was $70,000.

Section 12 of Art. 9, in force in 1870, of the constitution of the State, is in these words: "No county, city, township, school-district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum of the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness."

Upon the trial the following questions arose:

First. Whether said twelfth section of the ninth article of the constitution of the State of Illinois, by its own force and terms, without appropriate legislation, limited or affected the otherwise lawful power of the city of Litchfield to issue the bonds and coupons, and sell the same to raise money for the construction of water-works, according to the provisions of the act of April 15, 1873, and the ordinance of the city of Litchfield No. 184, in relation thereto, so as to render said bonds and coupons void as being in excess of five per cent including existing indebtedness on the value of taxable property in said city as ascertained by the last assessment for State and county taxes preceding the issue of such bonds.

Second. Whether the facts offered in evidence for the purpose of showing the value of taxable property in the city of Litchfield for the year 1873 are competent and sufficient to establish the value of taxable property therein, to be ascertained by the last assessment thereof, for State and county taxes previous to the issue of such bonds.

Third. Whether the said facts tending to prove that the said bonds, including the indebtedness of said city, exceeded five per cent on the value of the taxable property of said city at the time they were issued, as ascertained in manner before stated, are admissible or competent as evidence in this case to impair the rights of the plaintiff as a *bona fide* holder of the coupons sued on.

And the opinion of said judges being opposed upon the questions the latter were duly certified in this court.

Mr. JUSTICE HARLAN, after stating the case, delivered the opinion of the court:

The first and most important of the certified questions involves the construction of the twelfth section of the ninth article of the constitution of Illinois.

The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15, 1873, to incur indebtedness in the construction and maintenance of a system of water-works, could have been lawfully exercised by a city, incorporated town, or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur. *Law et al. v. The People ex rel.*, 87 Ill., 385; *Fuller v. City of Chicago*, 89 Id., 282.

It was proved that the debt of the city of Litchfield on and before the 1st of January, 1874, exclusive of the water-bonds, was $70,000.

If, therefore, it appears by evidence, of which the city may rightfully avail itself, as against a *bona fide* holder for value of the coupons in suit, that the bonds, issued January 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void from the want of legal authority to issue them at the time they were issued.

To the evidence upon which the city relied as showing such want of authority, objections were interposed by the plaintiff, who insisted that it was not admissible against him as a *bona fide* holder of the coupons in suit.

That evidence was made the basis of important findings of fact. Introduced for the purpose of showing the value of tax-

able property within the limits of the city, and the extent of her indebtedness, when these water-bonds were issued, it is not in our opinion liable to any serious objection. It seemed to be the best proof upon those subjects that the law furnished.

In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved not by information derived from individual officers of the municipalty, but only in the mode prescribed in the constitution; that is, by reference to the last assessment for State and county taxes, for the year preceding the issuing of the bonds. That test was applied in this case. Had there been, under or by competent legal authority, an assessment for that year of taxable property within the city, separately from all other property in the county or township to which the city belonged, such assessment would undoubtedly have been controlling. But there was no such official assessment, in fact, or required by law. There were, however, official assessments for State and county taxes for 1873, embracing all taxable property within the county and townships of which the city formed a part, and from which, in connection with the map of the city, could be readily ascertained the location and taxable value of all property within the corporate limits of the city for that year. The purchaser of bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873.

But in what way was the purchaser to ascertain the extent of the city's indebtedness existing at the time the bonds in question were issued? The extent of that indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the city. It was necessarily left, both by the constitution and the statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not at all times and abso-

lutely, or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation, possessing the general power of raising money, by taxation and otherwise, to carry on local government. Its liabilities might frequently vary in their aggregate amount, and at particular periods might be of different kinds, some fixed and absolute, while others would be contingent upon events thereafter to happen. These considerations were, doubtless, present in the minds as well of those who formed the constitution as of those who passed the statute of 1873.

As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their "existing indebtedness," it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the constitution were met—that is, that the city's indebtedness, increased by the amount of bonds in question, was within the constitutional limit,—then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma v. Eaves* (92 U. S., 484), in which case we said, and now repeat, that "where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, *their recital that it has been*, made on the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." So, in the more recent case of *Orleans v. Pratt* (99 Id., 676), it was said that "where the bonds on their face

recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital."

The cases cited by counsel for the plaintiff do not assert any different doctrines, as will be seen from an examination of those chiefly relied upon. In *Commissioners of Knox County v. Aspinwall* (21 How., 539), which was a case of municipal subscription of stock in a railroad company, the statute upon which the subscription there purported to rest made the existence of certain facts essential to the exercise of authority to make the subscription and issue bonds therefor. The bonds, upon their face, however, recited that they were issued *in pursuance* of the statute, which prescribed the conditions precedent to any subscription, and, therefore, the court said, they imported a compliance with the law under which they were issued. It was, consequently, ruled that the purchaser was not bound to look further for evidence of a compliance with the condition annexed to the grant of the power.

In *Kenicott v. Supervisors* (16 Wall., 452), the rule was thus stated: "If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes or issues the bonds, *with a recital that the election has been held or that the fact exists or has taken place*, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds."

In *County of Moultrie v. Savings Bank* (92 U. S., 631), the validity of the bonds there in suit was questioned, upon the ground that certain precedent conditions imposed by statute had not been complied with. The bonds, however, recited their issue to be "*in conformity to the provisions*" of the statute which gave the authority to issue them. So, in *Marcy v. Township of Oswego* (Id., 637), where the statute authorizing a municipal subscription, with the sanction of three-fifths of the voters interested, and the issue of bonds in payment thereof, required particular facts to exist and certain acts to be performed before the right to make the subscription and to issue bonds in discharge thereof could be exercised. The

statute contained, amongst other things, a proviso to the effect that the amount of bonds sold by the township should not exceed such a sum as would require a levy of more than one per cent per annum on the taxable property of the township to pay the yearly interest. It appeared that the statute had not, in some of these respects, been complied with; that is, that the conditions had not been performed which the statute required before any subscription should be made or bonds issued. But, adhering to the rule announced in *Town of Coloma v. Eaves*, the defense was overruled in favor of a *bona fide* holder for value, because of the *recital* in the bonds that their issue was "*by virtue of*, and *in accordance with*," the statute, and "*in pursuance of*, and *in accordance with*, the vote of three-fifths of the legal voters of the township."

Returning to the case in hand, it will be observed that the bonds issued by the city of Litchfield contain no recital whatever of the circumstances which, under the constitution of the State, must have existed before the city could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of the ordinance of the city based upon the statute. But that statute does not expressly restrict the exercise of the power to erect and maintain a system of water-works to cases in which the aggregate indebtedness of the city was within the limit which the constitution declared no municipal corporation should exceed. Nor does the city ordinance recite, or state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the constitution of the State, or under the circumstances which permitted the issue of the bonds. Consequently a recital that the bonds were issued under the authority of the statute, and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution. Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the con-

stitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement, as to the extent of its existing indebtedness.

Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds farther than would be consistent with reason and sound policy, and farther than we are now willing to go. The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold.

Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the city of Litchfield with a system of water-works, the benefits of which are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case, in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.

Whether the city is under a legal obligation to make restitution of the money obtained without authority of law; that is, to refund to the proper party, or parties such sums as were actually received by its authorized agents, or officers, upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion.

What we have said constitutes a sufficient answer to all of the questions certified to us, and requires an affirmance of the judgment.

JUDGMENT AFFIRMED.

A MUNICIPAL CORPORATION IS ESTOPPED FROM DENYING THE VALIDITY OF DEBENTURES, IN THE HANDS OF AN INNOCENT ASSIGNEE, IF THEY ARE ISSUED IN THE FORM PRESCRIBED.

TWENTY-SEVENTH SELECTED CASE.

WEBB AND OTHERS v. THE COMMISSIONERS OF KEENE BAY.*

ESTOPPEL—DEBENTURE—ASSIGNEE OF—ILLEGALITY OF CONTRACT—MANDAMUS.—A body corporate, having issued debentures, which are assignable, and purport to have been executed pursuant to powers conferred by statute, is estopped from alleging against an innocent assignee for value that the debentures have been issued illegally and in contravention of the statutory powers; and the assignee may by action of mandamus compel the body corporate to apply its funds to liquidate the interest due on the debentures, as required by their act of incorporation.

Commissioners were incorporated by statute for the purpose of improving the town of H., and were empowered to levy rates and to borrow money. For securing payment of the loans made to them they were authorized to issue in a prescribed form debentures, bearing interest and capable of assignment. A person being a commissioner was forbidden, under a penalty, to accept any contract for carrying out the objects of the statute. The commissioners bought bricks for the purposes of the act from P. H., a commissioner, and in order to provide for the payment of the bricks they executed and delivered to him debentures in the prescribed form, which were duly registered as required by the act. P. H. assigned them to the plaintiffs for value without notice of the circumstances under which they were issued. The commissioners having made default in payment of the interest due upon the debentures: Held, assuming the transaction to have been illegal, that, as the commissioners had issued the debentures knowing that they might be assigned, they were estopped from alleging that the debentures had been illegally issued; and that the plaintiffs were entititled to maintain an action of *mandamus* to compel the commissioners to apply their funds in payment of the interest.

AN action commenced by writ, with an endorsement that the plaintiffs intended to claim a writ of mandamus to command the defendants to apply money raised, or to be raised under or by virtue of 3 & 4 Wm. 4, c. cv., in the manner prescribed by section 123 of that act.

*Reported in 5 L. R. Q. B., 641; 39 L. J. Q. B., 221; 29 L. T., 745; 19 W. R., 241 (1870).

At the trial a verdict was taken for the plaintiffs subject to a case.

1. The defendants are a body corporate incorporated by 3 & 4 Wm. 4, c. cv., an act for paving, cleansing, lighting, watching, repairing, and improving a certain portion of the parish of Herne in the county of Kent.

2. By section 109, the commissioners were empowered to raise and levy from time to time such sums of money as they might think requisite by a rate assessment to be made and levied under the name and description of the "Repairing, Lighting, and Watching Rate."

3. By section 119 the commissioners were empowered from time to time to borrow at interest any sum of money upon the credit of the rate or assessment authorized to be made; and in the event of the same sum of money or any part thereof being repaid by said commissioners to borrow at interest in like manner any other sum of money, and so on *toties quoties;* but so, nevertheless, that there should not be owing upon the security at any time more than the aggregate sum of 5,000*l.* And it was enacted that every such mortgage security should or might be in the words or to the effect provided by the act.

4. By section 120, it was declared lawful for the holder of a security to transfer it in the form provided by the act.

5. By section 121, the holder of the security was entitled to his quota of the rate in proportion to the annual amount of the interest due on the mortgage without priority.

6. By section 123, it was enacted that the money to be raised by the rate, or on the credit thereof, should, in the first place, be applied in defraying the costs of obtaining the act, then in paying the interest of the several sums of money borrowed on the credit of the rate, then in executing the several works by the act directed to be done, and then in reducing, paying off, and discharging the several principal sums of money that might be from time to time borrowed on the credit of such rate.

7. The plaintiffs are assignees and transferees for value of six mortgages or securities upon the credit of the rate of 100*l.* each, bearing interest at 5*l.* per cent per annum. These mortgages were granted to David Halket under the circumstances

hereafter appearing, of which circumstances the plaintiffs' testator and the plaintiffs had no notice. These mortgages were, with other securities, deposited with the testator from whom the plaintiffs derived their title in 1836, to secure the sum of 4,000*l.* and interest. Upon Halket's bankruptcy, in 1859, these bonds were valued at 75*l.*, and were transferred by a deed which states the sum of 75*l.* to be the consideration of the transfer; but, after realizing all the securities a considerable balance of 4,000*l.*, exceeding the sum of 600*l.*, remained due. Such mortgages and the transfers of them to the plaintiff are all in the form prescribed by the act, and were duly registered after they were respectively executed, and the mortgages had the common seal of the commissioners affixed in the presence of five commissioners, who signed the mortgages. In no case was the said David Halket one of the said five commissioners.

8. David Halket was, and acted as a commissioner at the time of the execution and granting to him of the six mortgages, and he was a brick and tile manufacturer.

9. It appears by the minute-book of the proceedings of the commissioners, which was to be taken as correctly representing what took place at the meetings of the commissioners, that on the 11th of April, 1835, at a meeting of the commissioners, at which David Halket, with five others, was present, it was resolved that the offer of Halket to sell to the commissioners 125,000 bricks, at 1*l.* 12*s.* per 1,000, to be secured by debentures, be accepted, and that the clerk do prepare such debentures accordingly; and that on the 5th of August following, at a meeting of the commissioners, at which Halket was present, with five others, it was resolved that the meeting do seal and approve by the signature of five commissioners present, certain debentures, and amongst them two to Halket; viz., Nos. 19 and 20, each for 100*l.*, and the same having been done, the clerk was directed to register the same and hand them over to their respective owners.

10. It further appears by said minute-book that on the 17th of August, 1835, at a meeting of the commissioners, at which Halket was present, with five others, it was resolved that the clerk do prepare by the next meeting a debenture of 100*l.* to Halket, on account of work done by Ambrose Hickins,

and three additional debentures be prepared for David Halket in further discharge of his account for bricks, amounting to 427*l.* 4*s.*, and David Halket engaged to furnish bricks at 1*l.* 12*s.* per 1,000, to increase the amount of his claim to 500*l.*, and that on the 14th of September, 1835, at a meeting of the commissioners, at which David Halket was present, with five others, it was resolved that this meeting do seal and approve by the signatures of five commissioners present, four debentures to David Halket, and the same being done, that the clerk be directed to register the same and hand the same over to the owners.

11. Halket did, before the 14th of September, 1835, supply bricks to the said commissioners to the value of 500*l.*, and Ambrose Hickins was a contractor to execute a culvert and other works for the commissioners to the amount of 1,237*l.*, and he was also a debtor to Halket in the amount of 100*l.*, for bricks supplied to him, Ambrose Hickins by Halket, and he agreed to receive payment of said sum of 1,237*l.*, in 937*l.* in cash and in three of the mortgages of 100*l.*, each, and Ambrose Hickins by writing, dated the 8th of August, 1835, directed the commissioners to grant one of the said mortgages of 100*l.*, to David Halket, Halket having arranged with said Ambrose Hickins to take one of the mortgages of 100*l.*, in satisfaction of the debt of 100*l.*, due to him from the said Ambrose Hickins.

12. The two bonds granted to Halket on the 3d of August, 1835, together with the four bonds granted to him on the 14th of September, 1835, as mentioned in the 9th and 10th paragraphs, are the six bonds transferred to the plaintiffs as aforesaid, and the subject of the present action. No money actually was paid by Halket or Hickins to the commissioners.

14. The six mortgages so granted to Halket were duly transferred to the plaintiffs on the 5th of May, 1859.

15. Before the 5th of May, 1859, the costs, charges and expenses of applying for and incident to the obtaining and passing of the act, and of all interest upon money advanced for that purpose had been paid partly in cash, and as to 600*l.* residue thereof, by six debentures similar to those granted to Halket but neither before the 3d of August, 1835, nor since

has any money been raised or received by said commissioners applicable for reducing, paying off or discharging the principal sum of money borrowed on the credit of the rate or any part thereof, and such principal sums and the mortgage granted for the same have never been released or discharged.

16. Since the 5th of May, 1859, the commissioners have in every year raised and received by virtue of the act, under and by virtue of the reparing, lighting and watching rate money, sufficient to pay the interest of the several sums of money borrowed on the credit of the rate, and of the mortgages granted in respect thereof, including the mortgages hereinbefore mentioned and referred to, but the commissioners had not paid any interest on any of the mortgages but had applied the money so raised and received in executing the several works by the act directed to be done. The moneys received have never been more than sufficient to defray the costs of executing the several works.

19. At the time of the service of a demand for payment the commissioners had in their hands 2*l.* 11*s.* 0*d.*, money arising from the rates and applicable under the act to the purposes thereby prescribed and since that date, and before the commencement of this action had received further money so applicable, and they refused to pay any interest to the plaintiffs on the mortgages.

The court was to be at liberty to draw inferences of fact.

The questions for the opinion of the court were:

1. Whether the plaintiffs are entitled to recover in this action any and, if so what, sum of damages in respect to arrears of interest on the six mortgages or any of them.

2. Whether the plaintiffs are entitled to writ of mandamus in the form indorsed on the writ.

Cockburn, C. J.—By 3 & 4 Wm., c. cv., a local act, which provided for the paving, cleansing, lighting and improving the town of Herne Bay, certain commissioners are appointed; and by section 119 the commissioners have power to mortgage the rates which they are empowered to levy under the act for the purposes which they as such commissioners are to execute; and the present plaintiffs sue upon certain debentures which

were issued by the commissioners under that section; and they also claim a writ of mandamus requiring the commissioners to apply the money raised, or to be raised under the act, to the purposes of the act.

In order to construct certain buildings necessary for the purposes of the act, the commissioners required a quantity of bricks, and Halket, to whom the debentures were originally given, supplied the bricks in question; and instead of being paid in cash, he was paid by debentures. It is said that the transaction in respect to which the debentures were issued was illegal under section 10 of the local act, inasmuch as by that section any person acting as a commissioner is prohibited from entering into any contract with the commissioners, and that, therefore, the sale of the bricks by Halket to the commissioners, he himself being a commissioner, was an illegal transaction.

It may be that the effect of this section was to render the transaction illegal as regards the contract between the commissioners and Halket. But as the commissioners have had the benefit of the contract, the question would be whether or not Halket could recover in *indebitatus assumpsit* for goods sold. I do not think it necessary to decide that question. I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true, the commissioners have powers under section 119 only to borrow money, and it may be that under the powers to borrow they were not authorized to give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket in respect of the bricks which they got from him debentures in the form prescribed by the act, which purport upon the face of them to be debentures given for money advanced to them.

Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of the assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commis-

sioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied, instead of for money advanced. Under those circumstances it is clear the principle laid down in *Pickard v. Sears*, 6 A. & E., 469 (E. C. L. R., Vol. 33), and *Freeman v. Cooke*, 2 Ex., 654, 18 L. J. Ex., 114, is immediately applicable to the present case, as well, also, as the doctrine laid down in the judgment of this court in the case to which my brother BLACKBURN referred. *Re Bahia and San Francisco Ry. Co.*, Law Rep., 3 Q. B., 584.

In that case a railway company had been deceived into registering shares and granting certificates of registration, whereby innocent persons were induced to purchase those shares under the belief that the vendors were registered shareholders, and it was held that the company was estopped by their own act from denying the right of the innocent transferees of the shares, and to be registered as shareholders.

I think the principle in all these cases is strictly applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment, regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but according to the principle of the cases cited they are estopped from alleging that the debentures were illegally issued. The debentures on their face import a legal consideration; namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal? I think on the sound principle of the doctrine laid down in the cases which I have cited, such a defense cannot be made available.

I confess I cannot see any difficulty in the other points made; namely, that the first purpose to which the money raised by the commissioners is to be applied is that of paying the costs and charges of getting the act. It is true these expenses have been met partly by debentures which are still unpaid; but that

is no answer to an application for payment on the part of the present holders of these debentures.

It was further contended that the mandamus claimed by the plaintiffs will not lie, because it is possible that rates may not hereafter be raised, and the form of the mandamus ought to have been to levy rates out of which to pay the interest on the debentures; but it appears that up to the present time rates have from time to time been levied, and if the rates be levied, inasmuch as the commissioners are bound under the act to pay interest upon the debentures which they have issued, the mandamus will operate and compel payments of the amount claimed in this action.

If owing to the form which this mandamus assumes the commissioners desist from levying the rates the consequence will be that a further mandamus will be required, commanding the commissioners to levy a rate for the express purpose of paying the interest; but I think we are fairly entitled to presume that that which has been done, and which is a part of the duty of the commissioners to do under the provisions of the act will continue to be done.

BLACKBURN, J.—I am of the same opinion. The plaintiffs claim in the present action a writ of mandamus commanding the defendants to pay any money raised or to be raised under and by virtue of 3 & 4 Wm. 4, c. cv., in the manner prescribed by section 123 of that act. That is the duty they require the commissioners to fulfill, stating that the plaintiffs are personally interested in the fulfillment of it. When we turn to section 123, we find it requires the defendants to apply so much money as may be raised under the act in the first place in defraying its expenses, in the next place in paying the interest upon the bonds and debentures, and afterwards in paying for the works and purposes of the act. The plaintiffs are personally interested in having the money applied as provided by the act; and if the commissioners have departed from their duty of properly applying the money and causing the interest to be paid, the plaintiffs are entitled to a mandamus.

It is said that the commissioners will not raise any money in future; and if the plaintiffs had anticipated that, they

might have come to the court for a mandamus not only to command the commissioners to apply the money, but to levy rates to raise it; but I see no objection to granting a mandamus in the limited form in which it is asked for, though probably the plaintiffs may be entitled to demand another in a different form at some future time.

The next question is, are the plaintiffs personally interested in the fulfillment of the duty created by the statute; or in other words, are they the holders of the six debentures in such a manner as to have the right to have them enforced against the defendants?

By section 119 the commissioners are authorized to borrow and take up at interest any sum of money upon the credit of the rates authorized to be raised under the act, but so there shall not be owing upon the securities at any one time more than 5000*l.*, and *toties quoties*, to pay off and renew the loans, and the form of mortgage is given in the act. And that form commences with the statement on the face of it that the commissioners have borrowed a particular sum of money of a particular individual upon the credit of the rates.

Section 120 provides the mode in which a person who has the mortgage may assign and transfer it; section 121 enacts that there shall be no preference by reason of priority of the date of the mortgages. Section 122 requires that a book shall be provided in which copies of the mortgages securities and transfers shall be entered and registered, to be open to inspection; and then it enacts that after such entry every such transfer "shall entitle the person to whom the same shall be made, and his executors, administrators and assigns to the benefit of the security thereby made or transferred." So that the effect of the statute is this, the commissioners may borrow money and give a form of mortgage which, on the face of it, states expressly that they have borrowed a particular sum of money; the mortgage may be transferred, and when it is entered in the register which they are bound to keep, the transferee shall have the benefit of that security. The plaintiff's testator has *bona fide* taken a transfer of six mortgages on the face of which it is expressly stated that the commissioners

have borrowed from Halket (who is the person named in the mortgage) six sums of 100*l.* each.

The commissioners knew from the act that those mortgages when so granted might be transferred to a person on the faith of the matters stated in them. They knew from the act that such transfer might be made and might be entered on the register, and, when registered, the security might be transferred. That being the state of things, the plaintiffs, who are the *bona fide* holders of the mortgages, demanded the payment of the interest on the mortgages, and the commissioners deny their liability to pay on the ground that the matters stated on the face of the mortgages are incorrect and untrue. The law laid down in *Freeman v. Cooke*, 6 A. & E. 469 (E. C. L. R. Vol. 33), 18 L. J. Ex., 114; and *In re Bahia and San Francisco Ry. Co.*, Law Rep., 3 Q. B., 583, is very clear, that when a person has made a statement similar to the present, he is precluded as against another person who has *bona fide* acted upon it from denying the truth of the statement, and consequently I hold that the commissioners who have stated on the face of the mortgage that Halket had advanced and lent the money on the credit and for the purpose of the commissioners, are precluded as against his *bona fide* transferees from denying the truth of that statement.

Our decision on this point disposes of the case. I do not think it necessary to enter into the other questions. One is that, inasmuch as the mortgages were given in payment of a debt for bricks sold, they could not have been given for money borrowed. My impression is—and it is a very strong impression—that the legal effect of such a transaction is the same as if the commissioners had borrowed the cash and then applied it in payment of the debt for the bricks; and as if the creditor had lent the money upon the security of the debenture and then received back the identical coin in payment of his own debt for the bricks. I see no objection to this view of the transaction, which I incline to think valid.

A further objection was raised. It was founded on § 10 of the local act, which provides that where any commissioner is either directly or indirectly interested in any bargain or contract he shall be disqualified, and further, that no person

during the time he shall be such commissioner shall be capable of taking or entering into any such bargain or contract, nor shall any commissioner act in any matter in which he shall be personally interested. And § 11 imposes a penalty of 50*l.*, upon every commissioner who acts being disqualified. It was contended that Halket, who had furnished the bricks to the commissioners, being himself a commissioner at the time, the contract was illegal and void. It is not necessary to decide this question and I wish to guard myself from being thought to give any judgment on that point.

MELLOR, J.—I wish to rest my judgment in this case on the general doctrine of estoppel. I cannot distinguish it in principle from *In re Bahia and San Francisco Ry. Co.*, Law Rep., 3 Q. B., 583, which is founded on the very salutary decision of *Freeman v. Cooke*, 2 Ex., 654, 18 L. J. Ex., 114.

The local act contemplates the borrowing of money for the purposes of the works of the town of Herne Bay, and it gives the form of a mortgage upon which the money is to be borrowed. The form states that in consideration of the sum of money advanced and lent upon the credit of the rates for the purposes of the act, and paid to the treasurer of the commissioners, they thereby grant and assign a due proportion of the rates. That was the form of the mortgage in this case.

In addition to that the act, which enables the commissioners to raise money upon mortgage in that form, also enables the holder to assign the mortgages. He may, by a writing under his hand, transfer the same to any person, and it gives the form of indorsement by which the transfer may be made. There is a provision for registering the transfer, and when that is completed any person who is an innocent holder has a complete title. The commissioners who have borrowed the money and enable the transfer of the mortgage to be effected, cannot afterwards deny their liability on the ground that the mortgage was given, not for money lent, but for some purpose which they allege to be illegal. On that ground I hold the plaintiffs are entitled to the remedy they seek.

LUSH, J.—I also think it is unnecessary to express any opinion on the question whether if this action had been brought

by the original mortgagee, the commissioners could have set up any defense against the claim; because the defense—namely, his incapacity to contract at the time by reason of his filling the office of commissioner, cannot be set up against the plaintiffs, his transferees.

The mortgage security itself makes the money payable to Halket, or his assigns. The act of Parliament says that any person entitled to any security may transfer it in the terms specified in the act; and further, that when the transfer has been made and registered in the book of the commissioners—and this has been registered—every such transfer shall entitle the person to whom the same shall be made to the benefit of the security thereby transferred. Now, the effect of those sections, I think, is to make these mortgages negotiable securities, and to attach to them the incidents of negotiable securities; one of which is that an innocent holder for value, as it is admitted the plaintiffs are, acquires a title of his own unaffected by any infirmity to which the title of the assignor might have been subject. Upon this ground I think the plaintiffs are entitled to judgment.

Then as to the alleged defect in the prayer of the mandamus, I think it quite enough to say that the complaint against the commissioners is not that they do not make rates, but that they apply the proceeds in a different way than that directed by the act of Parliament. It is to be assumed that they will go on making the rates as they have done. The mandamus is directed to the misappropriation. If it turns out to be needful to compel them to do what they have hitherto done, and to make rates, then a mandamus may be applied for that purpose.

JUDGMENT FOR THE PLAINTIFFS.

WHERE THE AUTHORITY TO ISSUE BONDS FOR RAISING MONEY FOR CORPORATE PURPOSES IS CONDITIONAL.

TWENTY-EIGHTH SELECTED CASE.

The Royal British Bank v. Turquand.*

Plaintiff declared against defendants a joint stock company completely registered under Stat. 7 & 8, Vict., c. 110, on a bond, signed by two directors, under the seal of the company, whereby the company acknowledged themselves to be bound to plaintiff in 2,000*l.*

The plea set out the condition, which appeared to be for securing to the plaintiff, who was a banker, such sum as the company should, to the amount of 1,000*l.*, owe to plaintiff on the balance of the account current, from time to time, and for indemnifying plaintiff to that amount from losses incurred by reason of the account between plaintiff and defendants. The plea further set out clauses in the registered deed of settlement, by which it appeared that the directors were authorized under certain circumstances, to give bills, notes, bonds, or mortgages; and one clause provided that the directors might borrow on bond such sums as should, from time to time, by a resolution of the company, be authorized to be borrowed. The plea averred that there had been no such resolution authorizing the making of the bond, and that it was given without authority of the shareholders.

The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway.

On demurrers to the plea and replication, held, by the court of Exchequer Chamber, affirming the judgment of Q. B. that plaintiff was entitled to judgment, the obligee having, on the facts alleged, a right to presume that there had been a resolution at a general meeting, authorizing the borrowing the money on bond.

Semble, per Jervis, C. J., that such resolution would confer sufficient authority if it authorized the borrowing on bond of such sums as the directors might deem expedient, in accordance with the statute and deed, without otherwise defining the amount.

The plaintiffs declared against the defendant, as official manager of Cameron's Coalbrook Steam, Coal, and Swansea and London Railway Company, according to the Joint Companies Winding-up Acts (the company being completely registered under Stat. 7 & 8 Vict., c. 110). The declaration al-

*Reported in 6 Ell. & Bl., 327 (1856).

leged that the company, before defendant became official manager; to-wit., on 6th of March, 1850, by their writing obligatory, sealed with their common seal, acknowledged themselves to be held and firmly bound to plaintiffs in 2,000*l.*, to be paid to plaintiffs on request; for which payment the said last mentioned company did bind themselves and their successors. Yet the said sum, or any part thereof, has not been paid.

Plea in which was set out the condition, which appeared to be for the securing to the plaintiffs, who were bankers, such sum as the company should to the amount of 1,000*l.* owe to the plaintiffs on the balance of the account current, from time to time, and for indemnifying plaintiffs to that amount from losses incurred by reason of the account between plaintiffs and the company.

The plea further set out clauses of the registered deed of settlement of the company, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages; and one clause provided that the directors might borrow on bond such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed. The plea averred that there had been no such resolution authorizing the making of the bond, and that the same was given and made without authority or consent of the shareholders of the company.

The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway. It is then alleged that at a general meeting of the company it was resolved "that the directors of the company should be, and they were thereby authorized to borrow on mortgage, bond, or otherwise, such sums for such periods and at such rates of interest as they might deem expedient in accordance with the provisions or the deed of settlement and act of Parliament. And the said resolution and determination has thence hitherto remained unrescinded."

The replication then alleged that afterwards, in accordance with the authority granted by the general meeting, the directors agreed to enter into the bond, and appointed two directors to affix their seal, and the secretary to sign the bond, which

bond, so sealed and signed, plaintiffs took "in full faith and belief of the validity of the said resolutions, and that the said bond was authorized by and would be a valid and binding security upon the said company."

The plaintiffs also demurred to the plea. The defendant joined in the demurrer, and also demurred to the replication. Joinder.

In the last Trinity Term judgment was given for the plaintiffs in the Court of Queen's Bench. *Royal British Bank v. Turquand*, 5 E. & B., 248 (E. C. L. R., Vol. 85).

The defendant suggested error on this judgment in the Court of Exchequer Chamber, which the plaintiff denied.

JERVIS, C. J.—I am of opinion that the judgment of the Court of the Queen's Bench ought to be affirmed. I am inclined to think that the question which has been principally argued, both here and in that court, does not necessarily arise and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum, or sums of money, as shall from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed; and the replication shows a resolution passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so the other question does not arise.

But whether it be so or not, we need not decide, for it seems to us that the plea, whether we consider it as a confession and avoidance, or a special *non est factum*, does not raise any objection to this advance as against the company.

We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more.

And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the force of the document appeared to be legitimately done.

POLLOCK, C. B., ANDERSON, B., CRESWELL, J., CROWDER, J., and BRAMWELL, B., concurred.

NOTES.

Municipal bond, authorized on conditions—when decision of her officers on—conclusive.—In *Town of Coloma v. Eaves*, 92 U. S., 484, the suit was brought in the Circuit Court of the Northern District of Illinois to recover the amount due on the coupons attached to certain bonds of the town of Coloma, executed and issued by the proper officers of said town to the Chicago and Rock River Railroad Company, in payment of a subscription of $500,000 by that town to said company. The bonds recited that "this bond is issued under and by virtue of a law of the State of Illinois entitled, 'An act to incorporate the Chicago and Rock River Railroad Company, or bearer' approved March 24, 1869, and in accordance with a vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law, and under a law of the State of Illinois entitled 'An act to fund and provide for the paying of railroad debts of counties, townships, cities, and towns,' in force April 16, 1869; and when this bond is registered in the State auditor's office of the State of Illinois, the principal and interest will be paid by the State treasurer, as provided by said last mentioned law." These bonds were properly executed by the supervisor and clerk of the town. The defense interposed was that the officers of the town had no power to execute and issue the bonds, because the legal voters of the town had not been notified to vote upon the question of authorizing the town to make the subscription.

An act of the legislature of the State of Illinois incorporating the Chicago and Rock River Railroad Company, gave it power to build and operate a railroad from Rock Falls on Rock River to Chicago, a distance of one hundred and thirty miles, and it further provided that "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the State along or near the route of said road, might subscribe to the capital stock of said company."

That the town came within the class of municipal corporations authorized to subscribe by said act was not disputed, and the railroad was built into said town before the said bonds were issued.

The defense rested upon a section of the act of incorporation which provided as follows:

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township, in which the subscription is proposed to be made. And the clerk of said city, town, or township is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and tax-payers of such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township, which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town, or township, voting at such election, have voted 'for subscription,' it shall be the duty of the president of the board of trustees or other executive officer of such town, and of the supervisors in the townships, to subscribe to the capital stock of said railroad company in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor, or other executive officer, and be attested by the clerk of the city, town, or township in whose name the bonds are issued."

Mr. Justice STRONG, in this case, observes: "In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them, and they were registered in the office of the auditor of the State, in accordance with an act requiring that precedent to their registration the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they 'are issued under and by virtue of the act incorporating the railroad company,' approved March 24, 1869, 'and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law.' After all this, it is not an open question as between a *bona fide* holder of the bonds and the township whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and

certified their decision. They have declared the contingency to have happened, on the occurence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond these a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others—to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself." See, also, *Knox v. Aspinwall*, 21 How., 544; *Moran v. Miami County*, 2 Black., 732; *Mercer County v. Hackett*, 1 Wall., 83; *Supervisors v. Schenk*, 5 Wall., 784; *Mayor v. Muscatine*, 1 Wall., 384.

If the legislature has conferred power upon a municipal corporation to subscribe for the stock of a railroad corporation and to issue its bonds therefor, on some conditions precedent thereto, such as a petition by a certain number of its legal voters and taxpayers, or a popular vote favoring it, after a certain notice thereof to be given, if certain officers of the corporation are invested with the power to determine upon the question of the occurrence of the precedent conditions and they do determine that they have occurred, and they, under the provisions of the statute, execute and issue bonds of the municipality to the railroad corporation, in which there is a recital that such conditions have been complied with, such recital is conclusive upon the municipalty, where the bonds are held by a *bona fide* purchaser, and it is inadmissible for the latter to show that the precedent conditions have not been complied with.

Doctrine affirmed in several cases:—This doctrine has been affirmed in several recent cases by the Supreme Court of the United States. *Marcy v. Town of Oswego*, 92 U. S., 637; *Town of Coloma v. Eaves*, Id., 484; *St. Josephs Township v. Rogers*, 16 Wall., 644; *Van Hostrop v. Madison City*, 1 Wall., 291; *Mercer County v. Hackett*, Id., 83.

In *St. Josephs Township v. Rogers*, *supra*, the court say: "Power [to issue bonds in aid of the construction of a railroad] is frequently conferred upon a municipalty in a special manner; or subject to certain regulations, conditions or qualifications; but if it appears by their recitals that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled."

The doctrine affirmed in *March v. Fulton County*, *ante*, is not inconsistent with this, as in that case there were no recitals in the bonds, and no decision by any of the officers of the municipality that the precedent conditions had been complied with. Besides these the authority was given to subscribe for the stock and issue bonds to a certain railroad, but in fact it appeared that the stock was subscribed and bonds issued to a different corpo-

ration from that for which the vote was taken, and for which the people had voted.

The decisions of various State courts have sustained the foregoing doctrine. *Commissioners v. Nichols*, 14 Ohio, N. S., 260; *Society for Savings v. New London*, 29 Conn., 174; *Railroad Company v. Evansville*, 15 Ind., 395. An exception, however, is in New York, where a contrary doctrine was held in *Starin v. Town of Genoa*, 23 N. Y., 439, and *Gould v. Town of Sterling*, Id., 456; *The People v. Mead*, 24 N. Y., 114; *same v. same*, 36 N. Y., 224; in which case Judge GROVER observed: "But for the previous adjudication of this court I should have held that the affidavit filed with the clerk of Cayuga county pursuant to the second section of chapter 375, of the laws of 1852, was conclusive evidence of the assent of the taxpayers of the town, required by the act in favor of the *bona fide* holder of the bonds issued under its provisions."

Thus it would appear that even the courts of New York would accept the doctrines of the federal courts, except for the former adjudications.

Precedent facts recited in municipal railroad bonds cannot be controverted.—This doctrine was sustained in the case of *Marcy v. Township of Oswego*, 92 U. S., 637. By a statute of the State of Kansas it is provided that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county in the State, shall petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock, in the name of the township, in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock to be taken, it shall be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; provided that the amount of bonds voted shall not exceed such a sum as would require a levy of more than one per cent per annum on the taxable property of the township to pay the yearly interest on the bonds.

The statute further directs the board of county commissioners to make an order for holding the election, specifying therein the amount of stock proposed to be subscribed and the form of the ballots to be used; and if three-fifths of the electors voting at such election vote for the subscription, it is made the duty of the board of county commissioners to order the county clerk to make it in the name of the township; and cause such bonds as are required by the vote and subscription to be issued to the railroad corporation, in the name of the township, signed by the chairman of the board and attested by the clerk, under the seal of the county. Such bonds were issued, to the amount of $100,000, in which it was stated that they were issued by virtue of the statute (approved February 25, 1870), and in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township, at a special election held for that purpose.

In a suit brought on some of the coupons thereof by a *bona fide* holder for value, it was held that it could not be shown as a defense that at the time of the voting and issuing the bonds the taxable property of the township was not sufficient in amount to warrant the issuing of all said bonds; that the plaintiff was not bound to look beyond the act of the legislature and the re-

citals of the bonds when he purchased the same, and that these facts therein stated could not be controverted.

Mr. Justice STRONG, after stating the foregoing facts, maintains the conclusions of the court in this case as follows:

"Each bond also declared that the board of county commissioners of the county of Labette (of which county the township of Oswego is a part) had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners, and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. Nor is this all. The bonds were registered in the office of the auditor, and certified by him in accordance with provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legily issued, that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

"In view of these facts, and of the decisions heretofore made by this court, the first question certified to us cannot be considered an open one. We have recently reviewed the subject in *Town of Coloma v. Eaves*, *supra* p. 484, and reasserted what had been decided before; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactments that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds had been conditionally granted. Applying this settled rule to the present case, it is free from difficulty. The act of the legislature under which the bonds purport to have been issued was passed Feb. 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; provided, that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest.

"The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and

to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used.

"The fifth section enacted that if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board and attested by the clerk, under the seal of the county.

"These provisions of the legislative act make it evident not only that the county board was constituted the agent to execute the power granted, but that it was contemplated the board should determine whether the facts existed which, under the law, warranted the issue of the bonds. The board was to order the election, if certain facts existed, and only then. It was required to act, if fifty freeholders who were voters of the township petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment. Of course the board, and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other person could have. Moreover, these decisions were to be made before they acted, not after the election and after the bonds had been issued.

"The order for the election then involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such a one as was contemplated by the law; and that the amount proposed by it to be subscribed was not beyond the limit fixed by the legislature.

"So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued "by virtue of and in accordance with" the legislative act, and in "pursuance of and in accordance with the vote of three-fifths of the legal voters of the township," was another determination not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

"It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for the subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds, as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound when he pur-

chased to look beyond the act of the legislature and the recitals which the bonds contained. It follows that the first question certified to us should be answered in the negative."

In *Buchanan v. City of Litchfield, ante*, the city had received the money for which the bonds were sold, and used it in the construction of water-works for the benefit of the city, and the question suggested by the court is, whether the city is legally bound to refund the amount of money so received to the proper parties. This question will be found discussed in *ante* selected case nineteen and notes thereto, and selected cases twenty and twenty-one, where the preponderance of authority and weight of argument is in favor of a recovery in such cases.

In *Orleans v. Platt*, 99 U. S., 676, parties claiming to be a majority of the taxpayers of the town of Orleans, in the State of New York, and to own the greater part of the taxable property of the town, petitioned the county judge, in pursuance of the provisions of a statute of that State, for an order that the bonds of the town to the amount of $80,000 should be issued to enable it to subscribe and pay for that amount of capital stock of a railroad company. After hearing the petitioners and their opponents at the appointed time (July 1, 1871), the county judge ordered the bonds to be issued, and in pursuance of the requirements of the statute, appointed three commissioners to execute and deliver the bonds. Certain dissatisfied parties thereupon made an application to the Supreme Court for a writ of *certiorari*, which was allowed September 30, 1871, and served upon the county judge, who made a proper return to the same. The judgment of the county judge was affirmed by the Supreme Court. In July, 1872, the case was taken to the Court of Appeals of that State, and in February, 1873, that court reversed the previous judgments and ordered the petition to be dismissed. In the meantime, on the 3d of April, 1872, the commissioners appointed by the county judge subscribed for 800 shares of the stock of the railroad company, amounting to $80,000, and on the next day issued and delivered in payment thereof 160 bonds of town of $500 each, and received for the town scrip for the stock. On the face of each bond there was a certificate that it had been duly registered in the office of the clerk of the county, and they purported to be issued by virtue of certain acts of the legislature particularly designated, and set forth that the "commissioners, under the acts above referred to, for the town of Orleans, * * * upon the faith and credit, and on behalf of said town, and confirmed by a majority of the taxpayers, representing a majority of the taxable property of the same, according to said acts, for value received, do promise," etc.

On the 4th of February, 1874, the plaintiff, who, in good faith and for a valuable consideration purchased certain of these bonds, and brought suit upon interest coupons belonging thereto, in the Circuit Court of the United States for the Northern District of New York, where the court directed the jury to find for the plaintiff, and judgment was rendered accordingly. On error, in the Supreme Court of the United States, Mr. Justice SWAYNE said: "A preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them until the case made by the *certiorari* was

brought to a close. This would have involved only an ordinary exercise of equity jurisdiction. *The State of Illinois v. Delafield*, 8 Paige (N. Y.), 527; s. c., on appeal, 2 Hill (N. Y.), 160. The omission was gross *laches*. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any shall ensue, will be due not to the law or its administration, but to the supineness of the town and the contestants. *County of Ray v. Van Sycle*, 96 U. S., 675.

"Where one of two innocent parties must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Herne v. Nichols*, 1 Salk., 289; *Merchants' Bank v. State Bank*, 10 Wall., 604. * * * The doctrine of *lis pendens* has no application to commercial securities. *Murray v. Lyburn*, 2 Johns. (N Y) Ch., 441; *Kieffer v. Ehler*, 18 Pa. St., 388; *Stone v. Elliott*, 11 Ohio St., 252; *Mims v. West*, 38 Ga., 18; *Litch v. Wells*, 48 N. Y., 585; *County of Warren v. Marcy*, 97 U. S., 96.

"The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court. *Lynd v. The County*, 16 Wall., 6; *Township of Rock Creek v. Strong*, 96 U. S., 271. The plaintiff had no notice, actual or constuctive, of the proceedings in this case subsequent to the first judgment, and is in no wise affected by them."

The instruction of the court below was held to be correct. See also, *Merchants' Bank v. The State Bank*, 10 Wall., 604; *Otis v. Cullom*, 92 U. S., 447; *Lambert v. Heath*, 15 Mee. & W., 486.

Where municipal bonds were held void, authority to issue them being annulled by the constitution.—In *Town of Concord v. Portsmouth Savings Bank*, 92 U. S., 625, the facts were as follows: An act of the General Assembly of the State of Illinois authorized certain towns, acting under a township organization law of the State, to appropriate money to aid in the construction of a certain railroad, and to be paid to said railroad as soon as its track should have been located and constructed through such towns, provided the proposition to appropriate moneys to said company should first be submitted to the legal voters of the respective towns, at a regular, annual or special meeting, after ten days' notice thereof, and a majority of the votes cast should be in favor of such appropriation; and the authorities of such townships were authorized and required to levy and collect a tax and make provisions for the prompt payment of the appropriation under the provisions of the statute.

Pursuant to a notice for that purpose an election was held November 20, 1869, and a majority of the voters of the town of Concord, one of the towns authorized by the statute to appropriate money as aforesaid, voted the sum of $25,000 to be donated to said railroad company, provided it ran its railroad through the village of Concord, or on its boundaries, and to and through the town of Sheldon, in Sheldon township.

On the 20th day of June, 1870, the railroad company filed in the town clerk's office a written notice of the acceptance of the donation, which was addressed to the supervisor and town clerk.

The new constitution of the State of Illinois, which took effect July 2, 1870, provided that:

"No county, city, town, township, or other municipalty, shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: *Provided*, however, that the adoption of this article shall not be construed as affecting the right of any such municipalty to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

On the 9th of October, 1871, the supervisor and town clerk executed bonds, for the township of Concord, in which it was stated that they were issued in pursuance of the aforesaid statute, and to which coupons were attached, for the interest to accrue thereon. Suit was brought on some of these coupons and judgment rendered thereon by the Circuit Court of the Northern district of Illinois.

On error, in the Supreme Court, the principal question presented was whether the statute gave the supervisor and clerk of the town power to execute and deliver town bonds on the 9th day of October, 1871, as an appropriation or donation to the railroad company, the new constitution having prohibited "donations to or loans of credit in aid of such corporation," although the right to make subscriptions was reserved in cases "where the same may have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

The court held, that under the statute the town could not make an appropriation or donation to aid the railroad until it was located and constructed through the town; that the constitution prohibed donations of towns to railroad companies after it went into effect, and that at the time the donation of the bonds were issued to the railroad company there was no authority in the town to issue the same.

No claim was made in this case of any special right of the plaintiff as a *bona fide* holder of the coupons; and under the facts of the case and the ruling of the court, the claim of a *bona fide* holder of the bonds and coupons, would not alter the case, as the town had no power under any circumstances to issue the bonds, and they would be null and void in the hands of any party.

Where, under a different state of facts, municipal railroad bonds were held valid.—Immediately following the above case was that of *County of Moultrie v. Savings Bank*, 92 U. S., 631, in which the constitutional prohibition aforesaid was set up as a defense to municipal bonds issued after the adoption of the constitution of the State of Illinois. In this case the authority to issue bonds of the county of Moultrie, in that State, was given by the act incorporating the railroad company as follows:

"The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company [the Decatur, Sullivan, and Mattoon Railroad Company] to an amouut not exceeding $80,000, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent per annum, such bonds to be issued in such denominations and to mature at such times as the board of supervisors may determine:

Provided, That the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

This act took effect March 26, 1869. On the 16th of December following the board of supervisors informally resolved to subscribe $80,000 to the capital stock of said company, which resolutions were subsequently formally entered upon the minutes of the board. They provided for the issuing of bonds in full payment of the subscription. Under a subsequent action on the 25th of December, 1872, the bonds were issued, in accordance with the previous resolution of the board. In the meantime the new constitution, referred to in the last preceding case, on July 2, 1870, came into operation, and this was claimed to render the bonds null and void. But the court held the resolutions of the board of supervisors amounted to a contract, so far as related to the holder of the bonds who purchased them in good faith before maturity, and without notice of any defense; that the constitution of the State could not impair the obligation of the contract; and that the power to subscribe carried with it authority to issue the bonds, and the subscription being valid the bonds were equally so.

Referring to the subscription in this case Mr. Justice STRONG observes: "The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act—its immediate subscription."

Se, also, *Western Saving Fund Societg v. The City of Philadelphia*, 31 Pa. St., 174; *Sacramento v. Kirk*, 7 Cal., 419; *Logansport v. Blakemore*, 17 Ind., 318; *Justices of Clark County v. Clark County Court*, 11 B. Mon., 143. A subscription by the county on the books of the company is not necessary. *Nugent v. The Supervisors of Putnam County*, 19 Wall., 241.

The English cases we have copied, *Webb et al. v. The Commissioners of Herne Bay*, and *The Royal British Bank v. Turquand*, further illustrate the doctrine in its application, both to municipal and private corporations, and indicate that the English courts are in harmony with the American on this question.

CHAPTER XII.

MUNICIPAL CORPORATIONS NOT LIABLE FOR ULTRA VIRES TRESPASSES, DONE EVEN COLORE OFFICII.

TWENTY-NINTH SELECTED CASE.

HORN v. THE CITY OF BALTIMORE.*

The mayor and city council of Baltimore are the agents and representatives of the inhabitants or corporators of the city of Baltimore, intrusted with powers specially defined and limited, which can be exercised in the manner and form only prescribed by law.

When they transcend these powers, their acts, although done *colore officii*, and upon pretense of law, are no more binding upon the corporators than would be the acts of an agent in any other case upon his principal when done beyond the scope of the authority conferred.

Where the mayor and city council of Baltimore have no power to authorize an act to be done, it being *ultra vires*, they have no power to adopt it after it is done.

Appeal from the Superior Court of Baltimore City.

THIS was an action brought against the appellees by the appellant to recover damages done to a certain lot of ground belonging to him, by the reason of the grading of North Avenue.

Exception: The plaintiff, to support the issue on his part, offered in evidence the transcript of the record in the case of *Mayor and City Council of Baltimore et al. v. Porter et al.*, decided by this court 9th of April, 1862; and it was agreed

*Reported in 30 Md., 218 (1869).

for the purposes of this appeal that either party might use and refer to any part of the record, and to any of the papers proved therein, as if the same had been regularly proved in this case. He then offered evidence to show the nature, character and extent of the injury done to his property. To the admissibility of this evidence the defendants objected, on the ground that even if it were true it did not create any right of action against them; that the city could not be made responsible in any form of action to the plaintiff for the injury that might have been done to his property by the grading of North Avenue.

The court (MARTIN, J.) sustained the defendants' objection, and decided that the evidence was inadmissible, and ordered a judgment of *non pros* to be entered.

To this ruling and opinion of the court the plaintiff excepted, and the verdict and judgment being against him, he appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON and ALVEY, J.

William F. Frick, for the appellant.

The principles announced in the various cases in this court, in which the city has been held not bound by the unauthorized acts of its officers, though done *colore officii*, etc., do not apply to this case. In those, the attempts were made to hold the city for the *contracts* of its officers, made beyond the scope of their authority; and all the decisions proceed upon the ground that all parties dealing with the city's officers *do so at their peril*, and are bound to know the precise scope of their authority and whether it is rightfully exercised, etc. *Mayor and City Council of Baltimore v. Eschbach*, 18 Md., 276; *Mayor and City Council of Baltimore v. Reynolds*, 20 Md., 1.

A different set of principles apply when the claim is not founded on contract, but on *nonfeasance* or *misfeasance*. The injured party is in no default in the latter as in the former case. A municipal corporation may be held for a *tort;* and as the corporation is an entity which cannot of itself be guilty of a misfeasance, its responsibility in such case must necessarily grow out of the tortious act of its officers or agents. The

sensible rule is this, if the wrongful act be committed by a city officer, either *colore officii*, that is, by the general or special nature and functions of his office, or by some express city enactment, competent authority to act in the matter, wherein the wrong is done, and especially if he be so acting with an honest intention to benefit the public, the city and not the officer should be held responsible for the damage done. Angell and Ames on Corporations, page 250, Sec. 10; edition of 1861, page 308, Sec. 311.

In this case the city commissioner, who was clothed with the authority and charged with the office of grading the streets on certain application of property-holders, acted honestly for the public good, and in strict compliance *with existing ordinances*, in the belief that his proceedings were lawful, and with no means of knowing otherwise until the courts, after a long and doubtful controversy, pronounced them to be otherwise. His proceedings were *bona fide* in pursuance of a general authority over the subject-matter. This case comes fully within the principle of the decision of C. J. SHAW in *Thayer v. Boston*, 19 Pick., 511.

But whether the plaintiff's cause of action be regarded as growing out of a misfeasance of the city commissioner, or the misfeasance of the city in its corporate capacity, it would seem to be clear that the ordinance of December 9, 1858, ratifying the proceedings of the city commissioner in grading the avenue, established the liability of the corporation itself.

The act of ratification in this case could not give validity to the tax which the city sought to collect, for the tax-payer had a right to require that the proceedings should be perfectly regular from the beginning. It was too late, as to him, to cure the fatal defect which invalidated the tax. But the act of ratification, which did not bind the tax-payer, *bound the city*. It committed the corporation to an adoption of the responsibility for the entire proceedings of the city commissioner.

Robert D. Morrison and *Wm. Henry Norris*, for the appellee.

The declaration avers that the appellee, "in the exercise of a pretended corporate power and authority to grade said ave-

nue by its public officers and agents, but without any such authority, and in violation of the rights of the plaintiffs," caused by embankment the injury to plaintiff's lot. In English practice this declaration would have been met by a demurrer, a municipal corporation not being liable for contracts or *torts* when connected with matters outside of chartered powers. But in this State the objection can be taken to the admissibility of any evidence to sustain such a declaration. Evans' Prac. (new ed.), 390, 391; *Turner v. Walker*, 3 G. & J., 388.

A municipal corporation is not liable for contracts or *torts* outside of its chartered powers. *Mayor and C. C. of Balt. v. Porter*, 18 Md., 284; *Mayor and C. C. of Balt. v. Eschbach*, 18 Md., 276; *Navigation Co. v. Dandridge*, 8 G. & J., 248; *McSpedon v. City of New York*, 7 Bosw. (N. Y.), 601; *Reynolds v. Mayor and C. C. of Balt.*, 20 Md., 1; Hilliard on Torts, 409, 409.

It was the duty of the appellant to have arrested the work by injunction, or to have sued the contractors as individuals. *Lester v. Mayor and C. C. of Balt.*, 29 Md., 415.

BRENT, J., delivered the opinion of the court.

This suit was instituted against the mayor and city council of Baltimore, to recover for damages done to a certain lot of ground, belonging to the appellant, by reason of the grading of North Avenue, which so intersected it as to impair, if not wholly destroy, its value.

The decision of this court in *Porter's case* (18 Md., 284), relieves us from the necessity of examining the various laws and evidences cited in the argument for the purpose of ascertaining the power and authority of the appellees to grade the avenue in question. It was there held that they had no such authority under the law, and that the acts done by them in the direction and prosecution of the work were illegal and void.

The declaration also, in this case, avers that the injury complained of was committed in "the exercise of a pretended corporate power and authority to grade said avenue by its public

officers and agents, but without any such authority," so that the only question presented for our decision, is the liability of the appellees for damages resulting from an act done *colore officii*, but void because without authority and beyond the scope of their power.

In determining this question, the relation which those who fill the offices of mayor and city council hold to the corporation, must be kept in view. The inhabitants of the city of Baltimore, incorporated under the name of "the mayor and city council of Baltimore," are authorized to select a mayor and members of the city council as the medium and organ through which their corporate powers are to be exerted.

These persons thus selected become the agents and representatives of the corporators. As such they are intrusted with certain powers, which are specially defined and limited, and which can be exercised by them in the manner and form only prescribed by law. To the extent alone of these powers can they bind their principal, and so long as they keep within them, the corporation is responsible for their acts. But whenever they transcend them, their acts, although done *colore officii*, and upon pretense of law, are no more binding upon the corporators than the acts of an agent in any other case can bind his principal, when done beyond the scope of the authority conferred.

We think the law applicable to this case is properly stated by DENIO, C. J., in *Howell and Christopher v. The City of Buffalo*, 15 N. Y. Rep., 522. He there says: "When the officer so far departs from his duty that the law adjudges the whole act void, the individual, and not the community, should answer. * * * If void, it was not a public or corporate act. It was the deed of individuals professing and probably believing that they acted by the authority of law, but in truth proceeding upon their own responsibility, without any lawful authority whatever. As they were acting without the scope of their public agency, this concluded nobody but themselves." The same doctrine is also very clearly laid down in *Harvey v. The City of Rochester*, 35 Barbour, 181.

The case of *Thayer v. The City of Boston*, 19 Pick., 511, which was relied upon in the argument by the appellant's counsel, upon a careful examination, will not be found in con-

flict with those cited above. It belongs to that class of cases in which municipal corporations have been held liable for *torts* committed by an irregular and illegal exercise of a power which the corporation possessed. They have no application to the case before us. Here the injury complained of was not occasioned by an act done within the scope of the power and authority of the corporation, but was the result of an act void and illegal because done without power or authority. Had the grading of North Avenue been within the power possessed by the corporation, and the injury to the plaintiff's property resulted from the careless or improper manner in which the work was done, it would have presented a very different question, and an action for such injury could have been maintained. It is wholly immaterial whether the mayor and city council by a subsequent ordinance adopted and ratified the grading of the avenue. If the act was void, because *ultra vires*, and they had no power to authorize it before it was undertaken or commenced, they certainly had no power to adopt it after it was done.

We think there was no error in the instruction given by the court below, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

LIABILITY OF MUNICIPAL CORPORATIONS FOR TRESPASSES DONE COLORE OFFICII.

THIRTIETH SELECTED CASE.

LEE v. THE VILLAGE OF SANDY HILL.*

To render a municipal corporation liable for the tortious acts of their servants and officers, it is enough that it should appear, either that they were expressly authorized by such corporation or that they were done *bona fide*, in pursuance of a general authority to act for the corporation on the subject in relation to which they were performed. MASON, J.

* Reported in 40 N. Y., 442 (1869).

The charter of an incorporated village provided that its officers should be five trustees and that such trustees should be commissioners of highways of the village, and have the same powers and be subject to the same duties as to the roads, streets and alleys of the village as commissioners of highways in towns, and might lay out or alter any street or highway through or upon any garden, orchard, yard or other lands in the village. Under a written resolution and order of such trustees, the overseer of highways wrongfully entered upon the land of the plaintiff and moved back a fence erected by him in front of his lot; the trustees in making the order, acting in good faith, erroneously supposing the plaintiff's fence was an encroachment upon the street, and that they were proceeding in pursuance of the authority conferred upon them by the charter: *Held* (JAMES, J., dissenting), that the plaintiff could maintain trespass against the village for such removal, whether the trustees were to be regarded as mere agents of the corporation, or it was deemed the act of the corporation itself.

Where the owner of land in a village causes a street to be laid out over it and dedicated to the public use, and the same has been used by the public as a highway for not more than five years, in the absence of any act of the village authorities in opening or working the said street, or accepting such dedication, it may be revoked by the owner, and the land does not become a public highway.

APPEAL from the judgment of the General Term, in the Fourth District, affirming a judgment at the Special Term, for the defendant, on a verdict reserved for consideration by the judge who presided at the Circuit.

The action was for trespass to land. The complaint stated the incorporation of the defendant, the plaintiff's ownership of the *locus in quo*, and averred that the defendant unlawfully, wrongfully and forcibly entered upon the premises owned by the plaintiff, took forcible possession thereof, removed the fences, dug up the soil, and threatened to make a highway. The answer contained a general denial, and also alleged that the land entered upon was a public highway and dedicated by the owner.

It appeared upon the trial that, in 1855, the then owner of the premises caused to be surveyed and laid out through his lands a street fifty-five feet wide, of which the *locus in quo* formed a part, sixteen and one-half feet wide; that before opening the street, the owner sold one lot, covenanting to open such a street; that the tract of land through which the street

was laid out has passed through several mesne conveyances into the hands of the plaintiff.

The street opened by the plaintiff's grantor, fifty-five feet wide was used of that width until 1860, when the plaintiff fenced in on the west side a strip a rod wide. This was the fence removed, and the strip so fenced in the premises trespassed upon.

July 6th, 1862, the trustees of the defendant passed the following resolution:

On motion,

Resolved, That Cherry street be widened in accordance with the petition of R. C. Cary and others, and that said street, when widened, be three rods wide, measuring from the east side of the fence on said street as it now stands.

Subsequently, in 1862, the trustees of the defendant caused it to be surveyed and recorded. November 6th, of that year, the trustees made the following order:

Whereas, A road used as a highway, in the village of Sandy Hill, town of Kingsbury, Washington county, leading from Canal street to Mechanic street, past the residence of Robert Cary, was laid out and dedicated by Stephen B. Lee, in the year 1859, and accepted and used by the public, and named and called Cherry street, but has never been sufficiently and properly described and recorded as a public road; now, therefore, we, the trustees of the village of Sandy Hill, in the town of Kingsbury, aforesaid, and commissioners of highways for the said village, at a regular meeting of the said board of trustees (all of said trustees except Jeremiah Finch being present), held on the 6th day of November, 1862, at said village, for the purpose of causing said road to be ascertained, described and entered of record in the town clerk's office, and having caused a survey of the said road to be made and ascertained, do order that the said road be, and the same is hereby ascertained and described as follows: Commencing at a post in the southwest corner of the door-yard fence in front of the house of Robert Cary, and running thence northwardly along the fence on the west side of the lands of said Cary, the lands of Orson K. Mason and John Moon to Canal street; thence westwardly along Canal street three rods; thence southwardly on

a line parallel with the said first mentioned line to Mechanic street.

DARIUS MATHEWSON,
G. W. CLARK,
H. CHURCH,
CHAS. STONE, JR.,
Trustees.

November 11, 1862, they made the following order:

To JOHN H. NORTHUP, ESQ., *overseer of highways in and for the village of Sandy Hill:*

You are hereby required and directed to remove the obstructions from Cherry street, in said village; to-wit., the fence placed in and along the westerly side of said street, so as to leave it free and clear of obstructions, to the width originally laid out, and as the same has been ascertained and recorded.

Dated, November 11, 1862.

DARIUS MATHEWSON,
G. W. CLARK,
H. CHURCH,
CHAS. STONE, JR.,
Trustees.

And on the 18th of November they made the following order and direction:

————, November 18, 1862.

To JOHN H. NORTHUP, *overseer of highways in and for the village of Sandy Hill:*

You are hereby ordered to remove the fence and other obstructions now in or being put upon the south part of Cherry street, in the village of Sandy Hill, so as to make a three rod street, the west line to be a straight line.

D. MATHEWSON,
H. CHURCH,
CHAS. STONE, JR.,
Trustees.

Under these orders the overseer proceeded and committed the trespasses complained of, and upon this evidence the court ordered a verdict for the amount of damage proved in favor

of the plaintiff, and reserved, for further consideration, the question whether the corporation was liable, and subsequently ordered judgment for the defendant on the ground that it was not liable for these acts of the trustees, although wrongful; which judgment was affirmed by the General Term. The charter of the defendant, so far as its provisions have any bearing on the case, will be found in chapter 48, of the laws of 1856, and chapter 130, of the laws of 1860.

Hughes & Northup, for the appellant, to show that trespass would lie against a corporation, cited, *Eastern Counties Railway Co. v. Broom* (2 Eng. Law and Eq., 406, 409); *Sharrod v. London and N. W. R. Co.* (4 Eng. Law and Eq., 404); *The Mayor, etc., v. Bailey* (2 Denio, 433, 439); *Sanford v. Eighth Av. R. R. Co.* (23 N. Y., 343); *Mott v. Mayor, etc.* (2 Hilton, 358, 364); *Lockwood v. Mayor, etc.* (2 Hilton, 66); *Howell v. City of Buffalo* (15 N. Y., 512, 519); *Dater v. Troy Turnpike and R. R. Co.* (2 Hill, 629); *Seneca Road Co. v. A. and R. R. R. Co.* (5 Hill, 170); *Bloodgood v. M. and H. R. R. Co.* (18 Wend., 9); *Hay v. Cohoes Co.* (3 Barb., 42); *Hay v. Cohoes Co.* (2 Coms., 159); *Beach v. Fulton Bank* (7 Cow., 484); 9 Serg. & R., 94; 4 Mann & G., 452; *Tremain v. Cohoes Co.* (2 Coms., 163); *Moore v. Fitchburg R. R. Co.* (4 Gray, 464); *Howe v. Buffalo and Erie R. R. Co.* (38 Barb., 124); *Watson v. Bennett* (12 Barb., 196); *Roe v. B. L. and C. J. R. Co.* (7 Eng. Law and Eq., 546); *Crawfordsville R. R. Co. v. Wright* (5 Ind., 250); *State v. Morris and Essex R. R. Co.* (3 Zabriskie, 360); *Goodspeed v. East Haddam Bank* (22 Conn., 530); *Allen v. City of Decatur* (23 Ill. R., 332); *City of Pekin v. Newell* (26 Ill. R., 320); *Freeland v. City of Muscatine* (9 Iowa R., 461); *Regina v. Great North of Eng. Railway* (58 E. C. L. R., 315); s. c., 9 Q. B., 315; 9 A. & Ellis, N. S., 312.

Upon the question of the liability of a corporation for the acts of its agents they cited *First Baptist Church of Schenectady v. The Schenectady and Troy R. R. Co.* (5 Barb., 79, 90); *Conrad v. Village of Ithica, supra; Perkins v. New York C. R. R. Co., supra; Sharrod v. The London and M. W. Railway Co., supra; P. W. and B. R. R. Co. v. Quig-*

ley (21 Howard's U. S. R., 202, 210); *Howell v. City of Buffalo, supra*; Ang. and Ames on Corp., 250, 330; 2 Kent Com., 284; *Lacour v. The Mayor, etc.* (3 Duer, 406, 414); *Mayor, etc. v. Bailey* (2 Denio, 433); *The Rochester White Lead Co. v. The City of Rochester* (3 Coms., 463); *Hay v. Cohoes Co., supra; Tremain v. Cohoes Co., supra; Lockwood v. The Mayor, etc.* (2 Hilt., 66); *Mott v. The Mayor, etc.* (2 Hilt., 364); *P. W. and B. R. R. Co. v. Quigley* (21 How., 210); *Clark v. The Corporation of Washington* (12 Wheaton, 40); s. c. (6 Peters' Con. R., 425); *Moore v. Fitchburg R. R. Co., supra; Thayer v. City of Boston* (19 Pick., 511); *Howe v. Buffalo, N. Y. and Erie R. R. Co., supra; Austin v. N. Y. and Erie R. R. Co.* (1 Dutcher, R. (N. J.), 381); *State v. Morris and Essex R. R. Co., supra; Watson v. Bennett* (12 Barb., 196); *Roe v. The B. L. and C. J. R. R. Co., supra; Conro v. Port Huron Iron Co.* (12 Barb., 27, 53); A. and Ames on Corp., Sec. 388.

Upon the point that the acts were committed by the defendant, and that the trustees were a corporation, they cited sections 1, 2 and 8, of chapter 48, of the laws of 1856; chapter 120, of the laws of 1860; SELDEN, J., in *Weet v. Trustees of the Village of Brockport* (16 N. Y., 161, 170); *Conrad v. The Trustees of Ithica, supra; Perkins v. N. Y. C. R. R. Co.*, (24 N. Y., 196, 213, 214).

MASON, J.—The doctrine is too well settled in this court to admit of discussion, that municipal corporations, like the defendant, are liable in trespass for the illegal acts of its officers. (*Conrad v. The Trustees of The Village of Ithica*, 16 N. Y. R., 162; *Howell and others v. The City of Buffalo*, 15 N. Y. R., 512; *Hickox v. The Trustees of the Village of Plattsburg*, 16 N. Y. R., 161, note; *Weet v. The Trustees of the Village of Brockport*, 16 N. Y. R., 161; *Storrs v. The City of Utica*, 17 N. Y. R., 104.) The rule is laid down in Angel and Ames, generally, that as natural persons are liable for the wrongful acts and neglects of their servants and agents done in the course and within the scope of their employment, so are corporations upon the same grounds, in the same manner, and to the same extent (page 302, § 10, 3d ed). It is not very im-

portant in this case to determine whether the trustees in this case acted as mere agents of this corporation, or whether their acts are to be regarded as the acts of the corporation, performed by the principal managing officers of the corporation; for in either view of the case, the defendants are liable for their acts in causing the fence in question to be torn down and removed. We will consider the case, in the first place, upon the supposition that in regard to the duties devolved upon the trustees as to the highway or streets within the corporation, they act as the mere agents of the corporation; and it cannot be denied upon the decisions in this court, that to this extent it is settled that they do act for the corporation, and that the corporation is liable for their acts to the extent of the rule governing principal and general agent.

The principal is liable in a civil suit to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts, or disapproved of them. (Story on Agency, § 452, p. 563.)

This rule of liability is not based upon any presumed authority in the agent to do the acts, but upon the ground of public policy, and that it is more reasonable, where one of two innocent persons must suffer from the wrongful act of a third person, that the principal, who has placed the agent in the position of trust and confidence should suffer, than a stranger. (*Hern v. Nichols*, 1 Salk. R., 289.) I examined this question of the extent of the liability of the principal for the wrongs of the agent, at the last term, in the case of *Davis and others v. Bemis* (in MS.), and which opinion was approved by the court. All that is necessary to render the principal liable for the malfeasance or torts of the agent is that the tort must be committed in the course of the agency (Story on Agency, § 456); not that the agency authorized it, or, as it is expressed by Paley, that the employment afforded the means of committing the injury. (Dunlop and Paley on Agency, 306.) The rule as to the liability of corporations, for the acts of their agents, is stated by Chief Justice SHAW in the case of *Thayer*

v. The City of Boston (19 Pick. R., 516), as follows: It must appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide*, in pursuance of a general authority to act for the city on the subject to which they relate, etc. This is the precise language in which the rule is laid down in Angel and Ames on Corp., p. 304, § 10, 3d ed., where the case of *Thayer v. City of Boston* is referred to and approved. This is certainly laying down the rule much narrower than it is held in most of the cases in the books, as between principal and agent generally where the principal has been held liable for the intentional wrongs of the agent, committed in the course of his employment. I do not mean to assert the rule as against municipal corporations broader than it is laid down by Chief Justice SHAW in the case referred to, as that will clearly embrace this case. Applying the rule as stated, that it must appear that the act was done by the agents of the corporation, *bona fide*, in pursuance of a general authority in relation to the subject of it, and I do not see why the defendants are not to be held for the acts of their trustees in this case. By section 2, of the defendants' charter, it is provided that corporations may exercise such powers as are or shall be conferred by law or by this act, etc.

The second section of the charter declares that the officers of the corporation shall be five trustees. The eighth section provides that the trustees of the said village shall be commissioners of highways of the said village, and shall have the same powers, and be subject to the same duties over the roads, streets and alleys of said village, as commissioners of highways in towns (laws of 1856, chapter 48), and by chapter 120, of the laws of 1860, the trustees are authorized to lay out or alter any street or highway through, or upon any garden, or land, or yard, or other lands in said village.

The undisputed evidence in this case shows beyond cavil that these trustees, in ordering the removal of this fence, were acting in pursuance of their authority in regard to the streets of the village, and there is no evidence to show that they did not act in good faith; while, on the contrary, it is fairly to be inferred from the evidence that they did so act. Cherry street, the street in question, was only two rods wide,

and it seems that the subject of having it a three rod street was brought before the trustees on the petition of R. C. Carey, and a request to have the street widened to three rods; and on the 7th of July, 1862, the trustees passed and recorded a resolution that Cherry street be widened in accordance with the petition of R. C. Carey and others, and that said street when widened, be three rods wide, etc. No further action seems to have been taken under this resolution; but on the 6th November, 1862, the trustees proceeded to make and file an order, as they were authorized under the statute to do, ascertaining, and describing, and entering of record this said street, and in this order they describe it as a three rod street. In this they probably committed an error, for although the street was originally dedicated or intended to be dedicated three rods wide, and was actually opened and used to that extent, yet as there was no sufficient acceptance by the corporation or the trustees, the judge, at Special Term, concludes, and rightfully, I think, that there was no such dedication before the fence was moved out as that the corporation can hold the street, to the width of three rods. The trustees undoubtedly supposed they could hold it, and were acting *colore officii* and in good faith, I have no doubt, in giving the order to the overseers to open the street by removing back the fence, so that the street could be three rods wide. It was their duty thus to open the street if their former acts were valid, and it follows upon well settled principles of law that they were acting within the scope of their public duties as trustees, and that the corporation is liable, assuming them to be mere agents of the corporation.

The decisions of both the Special and General Term appear to have proceeded upon the rule of law which cannot be applied to the case, that the act was unlawful and the trustees cannot be justified in the law, and therefore the defendant, as principal, is not liable. This, as we have seen, is not the rule of law applicable to such a case as the present. No one will pretend that the principal is liable for the willful trespasses of his agent, committed without color of right, or semblance of authority. This case is not of that character, and upon no construction of the evidence can it be regarded as such. It was the duty of these trustees, if they were right in their con-

clusion that there had been a dedication of this street to three rods in width, to cause it to be described, entered of record and opened. The most that can be claimed is that they, while acting within the general scope of their duties, have committed a mistake and done an illegal act. In such a case the corporation is liable. There is another view which may be taken of this case, and which is not without authority to support it, which renders the defendant's liability equally clear. The only officers who can act for, and who represent this corporation, as we have seen, are these trustees. It was said by Judge SELDEN, in delivering the opinion of this court in the case of *Perkins v. N. Y. Central R. R. Co.* (24 N. Y. R., 213), that a distinction is no doubt to be made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation and are its only direct medium of communication with outside parties, they must in respect to all external relations be considered as identical with the corporation itself.

He says, in considering this very question, in the case of *Weet v. The Trustees of the Village of Brockport* (16 N. Y. R., 170), and which was adopted as the opinion of the court in the case of *Hickox v. The Trustees of the Village of Plattsburgh* (16 N. Y. R., 161), that there can be no doubt that the powers conferred upon the trustees devolve upon the corporation. That on all charters creating corporations, powers conferred upon those who stand in the place of, and represent the corporative body, are deemed to be conferred upon the corporation itself. And that the defendants are to be treated as invested in their corporate capacity, with all the powers of commissioners of highways, over the roads and streets of their village. These views, if sound, and it seems to me they are, leave no doubt as to the defendants' liability. It has been held in several cases in this court, that these duties in regard to the street, which are nominally upon the trustees, rest upon the corporation, and that the corporation is liable for any misfeasance of the trustees in regard thereto. The trustees are the managing officers of the corporation, and they alone can exercise the powers of the corporation. They represent and speak, and act for it, and their acts in the case

under consideration must be regarded as the act of the corporation. Herein lies the error in the opinion of the court below. It is, if I properly appreciate the arguments, that this is not to be regarded as the act of the corporation because it was an unauthorized act; an act which the corporation had no right to do, and that it shall not be deemed the act of the corporation, although done by the managers, who are the proper representatives of the corporation. This will hardly do, as it would, carried to its legitimate result, always excuse the corporation. The act, if an unauthorized one, would not render them liable, and if an authorized one, then it is to be the act of the trustees, and not the corporation.

It certainly would be difficult to charge a corporation for a misfeasance under such a rule, as the corporation can only act through some representative, and if it is not liable for wrongful acts of its principal representatives or managers, much less would it be for any act of its subordinate agents.

The verdict in this case should not have been interfered with, and the judgment of the General and Special Terms must be reversed and a new trial granted or judgment rendered for the plaintiff on the verdict. The verdict was not set aside as against evidence, but upon legal grounds solely, and the decision of the general term is properly reviewable in this court.

HUNT, CH. J., WOODRUFF, GROVER and DANIELS, JJ., concurring.

LOTT, J., thought there was a mis-trial, and that the court had no power to order a verdict for one party, and, on reserving the case for further consideration, direct judgment for the other. It could only set aside the verdict and order a new trial, if satisfied, on further consideration, the action could not be maintained.

JAMES, J., was for affirmance. Judgment reversed, and judgment ordered for the plaintiff upon the verdict.

AN ACTION MAY BE MAINTAINED AGAINST A MUNICIPAL CORPORATION FOR A TORT, ALTHOUGH DONE COLORE OFFICII.

THIRTY-FIRST SELECTED CASE.

THAYER ET AL. v. CITY OF BOSTON.

AN action sounding in tort may be maintained against a municipal corporation.

A municipal corporation may be liable in an action of the case for an act which would warrant a like action against an individual, provided that such act is done by the authority of the corporation, or of a branch of its government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or that after the act has been done, it has been ratified by the corporation by any similar act of its officers.

As a general rule, a municipal corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*.

It must further appear that the officers were expressly authorized to do the acts, by the corporation, or that they were done *bona fide* in pursuance of a general authority to act for the corporation, on the subject to which they relate, or that, in either case, they were adopted and ratified by the corporation.

THIS action was argued in connection with the case of *Stetson v. Faxon*, *ante*, *p.* 147. It was an action on the case, brought by Rufus Thayer and Amara Stetson.

The declaration contained two counts: The first sets forth that the plaintiffs are seized in fee, as tenants in common, of a messuage in Boston, bounded southerly on Market Square or North Market street, and along, and over, and by the southerly front of the messuage there long has been, and of right ought now to be, a free and open paved space, public street or passage-way to and from the messuage, extending from the westerly end of Dock Square along the range of buildings standing in line with the messuage and running eastwardly to the street called Roebuck alley, which way the plaintiffs, by reason of their seizure and ownership of the messuage, had a right to enjoy; that the defendants, on the 1st of September,

19 Pick. (36 Mass.), 511 (1837).

1825, took up the pavement in front of the messuage and range of buildings and dug up the soil, etc., and erected stalls, benches, etc., on the passage-way, and obstructed the communication with the messuage, etc., *per quod, etc.*

The second count avers that the defendants erected and caused to be erected certain fences, buildings and obstructions in and upon that part of the passage-way lying easterly of the messuage and of an alley running by the easterly side of another messuage belonging to Stetson, adjoining the messuage described in the declaration, by means of which this messuage has been obscured and darkened, and access to it is obstructed, etc., and also deposited large quantities of earth, brick, stones, etc., *per quod, etc.*

The defendants pleaded the general issue.

It appeared at the trial that the removal of the pavement, etc., and the depositing of earth, etc., in front of the plaintiff's messuage, were acts done by the officers of the city, having authority over streets and public lands, and claiming to act by authority of their office, and that the persons employed were paid from the city treasury; and that the erection of stalls, booths, etc., and the occupation of the land in front of plaintiff's messuage were by persons under permission from officers of the city, claiming authority as such; and that the city received rent therefor, claiming title to the *locus* in fee.

The defendants objected that this action could not be maintained against them, for any of the acts alleged to have been done in the public street in question, because they were performed, not by the city, but by the surveyors of highways and other officers duly authorized by law; and if the officers were not so authorized, they, and not the city, were responsible for their unlawful acts; that the corporation could not be made answerable for any unauthorized trespasses of its officers, and that in fact it was incapable of committing a trespass. But for the purposes of the trial it was ruled that the defendants were responsible for the acts of the officers of the city.

The jury rendered a verdict in favor of the plaintiffs, in which, by the consent of the parties, the damages were apportioned among the several causes of complaint.

If for any one or more of the causes of action set forth this

suit would be maintained against the defendants, judgment was to be entered for the plaintiffs for such sum as the jury assessed for such cause or causes of action; but if the city was not responsible for any of them, the plaintiffs were to be non-suited.

J. Pickering and *C. P. Curtis*, for the defendants, cited *Riddle v. Locks and Canals, etc.*, 7 Mass. R., 169; *Russell v. The Men of Devon*, 2 T. R., 667; *Mower v. Leicester*, 9 Mass. R., 247; *Baker v. Boston*, 12 Pick., 184, and the New York cases there cited.

Metcalf and *C. G. Loring*, for the plaintiff, cited *Lynn v. Turner*, Cowp., 86; *The King v. Bank of England*, 2 Doug., 524; *Sutton v. Bank of England*, Ryan & Moody, 52; 3 Dane's Abr., c. 74, *art.* 9; *Chesnut Hill Turnpike Co. v. Rutter*, 4 Serg. & Rawle, 6; *Smith v. Birmingham, etc., Gas Light Co.*, 1 Adolph. & Ellis, 526; *Yarborough v. Bank of England*, 16 East, 6; *Clark v. Washington*, 12 Wheat., 40; 4 Amer. Jurist, 303.

SHAW, C. J., delivered the opinion of the court:

This case, by consent, has been argued in connection with the case of *Steatson v. Faxon* pending in Suffolk, and involves many of the same facts which were presented in that case, and depends, to some extent upon the same principles.

The passage-way lying in front of the plaintiffs' estates and constituting part of what was formerly denominated Dock Square, is variously described, in different counts in the declaration, as a passage-way appurtenant to these estates, and as a public highway. We are apprehensive that some confusion has been thrown upon the case by treating this right of way as a private right, enjoyed by the plaintiffs in consequence of being seized of adjoining estate, instead of regarding the way as a public highway. It appears that it has been used by all the citizens of the commonwealth, to pass with their horses, carriages and teams for all purposes, for a period of more than forty years, from a time beyond legal memory, and this proves it to be a highway.

Many of the most important highways stand upon this basis and no other; and it would greatly endanger the public interests if a doubt could be raised whether the public have an easement in such highways, for the same purposes, and to the same extent, as in those which are proved by the records of the courts, by whom, in the legitimate exercise of their authority, they have been established. Indeed the law proceeds upon the presumption that at a period anterior to legal memory these highways were legally laid out, of which the evidence has been lost. It is doubted whether any other title for the public could be found to the use of the most frequented streets of the city.

The action is an action of the case against the city in its corporate capacity, for special damage, alleged to have been done to the plaintiffs, in their estate, by the officers of the city, having authority over the streets and highways of the city, by acts which they professed to do by virtue of their offices, and for the use and benefit of the city. It is a well settled rule of law, that if an individual suffer special damage, by any unlawful act, in obstructing a highway, he shall have his action although the party doing the act is liable to an indictment. But without such damage, although the act is unlawful, and although more injurious to one proprietor on account of his proximity to the highway than another, still he cannot have an action, because actions would thereby be multiplied indefinitely; but the offender shall be prosecuted by indictment, by which the offense shall be punished, and the wrong redressed once for all. What is special damage to sustain the *per quod* and enable one to have his several action, for an injury common to a whole community, is often a difficult question. It seems to be settled by authorities that it must be something not merely differing in degree, but in kind, from that which must be deemed common to all. But as this subject has been fully considered in the other case alluded to, it is not necessary in this, to discuss more at large.

Supposing this to be a public highway, and the plaintiffs to have sustained a special damage, so as to enable them, upon general principles, to maintain an action, then it is argued that such an action, sounding in tort, cannot be main-

tained against the city, in its corporate capacity; and whether such action can be maintained, is the question which has been mainly considered in the present case.

The argument strongly pressed by the defendants is, that if the officers of the corporation, within their respective spheres, act lawfully and within the scope of their authority, their acts must be deemed justifiable, and nobody is liable for damages, and if any individual sustain loss by the exercise of such lawful authority, it is *damnum absque injuria*. But if they do not act within the scope of their authority, they act in a manner which the corporation have not authorized, and in that case the officers are personally responsible for such unlawful and unauthorized acts.

But the court are of the opinion that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results.

There is a large class of cases in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their officers, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously requires that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the act thus done. It would be equally injurious to the individual sustaining damages, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. And it may be added that it would be injurious to the city itself, in its corporate capacity, by

paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers and subordinate persons might well refuse to act under the directions of its government in all cases where the act should be merely complained of and resisted by any individual as unlawful, on whatever weak pretense; and conformably to the principle relied on, no obligation of indemnity could avail them.

The court are, therefore, of opinion that the city of Boston may be liable in an action of the case, where acts are done by its authority, which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation, upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified by the corporation, by any similar act of its officers.

That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. *Yarborough v. Bank of England*, 16 East., 6; *Smith v. Birmingham, etc., Gas Light Co.*, 1 Adolph. & Ellis, 526. And there seems no sufficient ground for a distinction in this respect between cities and towns and other corporations. *Clark v. Washington*, 12 Wheat., 40; *Baker v. Boston*, 12 Pick., 184.

Whether a particular act, operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case. As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers though done *colore officii;* it must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation. As the evidence was not submitted to the jury in the present case, and the fact does not appear, but it is only found that the acts

complained of were done by officers of the city, the court are of the opinion that the verdict must be set aside and a

NEW TRIAL GRANTED.

A MUNICIPAL CORPORATION MAY BE LIABLE FOR A TRESPASS ON REAL PROPERTY.

THIRTY-SECOND SELECTED CASE.

SHELDON v. KALAMAZOO.*

MUNICIPAL CORPORATION: HIGAWAY.—A municipal corporation is liable to an action for an invasion of private property, unlawfully and forcibly taken for a way, under directions of the corporation board of trustees and corporate officers.

DUE PROCESS OF LAW: MUNICIPAL BOARD: JUDICIAL ACTION: INTERESTED PARTY CANNOT ACT AS JUDGE.—Whether a highway lawfully exists over private property is a question which cannot be settled against the owner without the right to a trial in due course of law; and the municipal board cannot decide upon it so as to bind him, and acts at its peril in attempting it. Such municipal action is not judicial, and if it were it would be void, because an interested party cannot be a judge in his own cause.

MUNICIPAL CORPORATION: HIGHWAY: ENCROACHMENT: VILLAGE MARSHAL. A municipal corporation cannot properly make a forcible entry upon premises in private occupancy under pretense of encroachment on a highway; but it should resort to legal proceedings before it can disturb a continued possession under claim of right. Compelling a village marshal to use such force, under threat of removal if he should not do so, would be a gross violation of duty and propriety.

Error to Kalamazoo Circuit.

CAMPBELL, J.—The present controversy arises out of certain actions of the marshal of the village of Kalamazoo, in pursuance of a resolution of the village board, in entering upon a close of the plaintiff and throwing down his fences, on a claim that he was occupying part of the village street.

*24 Mich., 383 (1872).

The plaintiff proved title to the land and offered to show a resolution of the president and trustees of the village, duly assembled, whereby the committee on streets were directed to notify all persons on the line of the Olmstead road, so-called, who had encroached upon the road within the village limits, by the erection of fences, or otherwise, to remove their fences and cease to encroach on it, and on failure of any one to comply, that the committee were directed to notify the marshal forthwith to remove the fences, so that said encroachment would cease to exist. He further offered to show that his land adjoined said road and his fence stood on the line, but that defendants claimed the fence was in the road and encroached on it; that thereupon they passed said resolution, and, in pursuance thereof the street committee notified the plaintiff to remove the fence, and set it back ten or twelve feet on his land, which he refused to do; and thereupon the committee directed the marshal to tear down and remove the fence, and threatened to remove him from office unless he did so; and he therefore complied with their directions and removed the fence.

The court refused to allow any evidence to be received, basing the refusal on the ground (as we infer from the objections) that the president and trustees acted in the capacity of public officers and not municipal agents, and that the corporation is not liable for their acts in the premises.

The injurious act complained of is not a public grievance, but is a wrong done to a private person. It is not a wrong arising from neglect, but is the direct operation of a willful trespass. The case is therefore freed from all those complications which attend the discussion of questions of liability for neglects and for public grievances. And as the whole control over the subject of streets in the village of Kalamazoo is in the corporate authorities, there is no room for the consideration of those difficulties which arise where corporate action is aimed at matters entirely foreign to the concerns of the municipality.

The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the predjudice of private parties. In this respect, public corporations are as distinctly legal persons as private

corporations. There are officers who are corporation agents, and there are municipal officers whose duties are independent of agency and with distinct liabilities. But when the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable.

There is no conflict whatever in the authorities on this head. The only disagreement is concerning corporate responsibility in cases of alleged neglect of duty, and concerning the bounds of what may be termed their legislative discretion, as distinguished from their other action. To hold that positive wrongs must in all cases be considered as purely individual and not corporate acts, would be a novelty in jurisprudence. Although not subject like corporations to the jurisdiction of courts, it has always been understood that even states and nations may be held responsible for the wrongs of their authorized agents, and the whole system of public law rests on this assumption. This idea, therefore, that a corporate body has a discretionary power to do wrong and not suffer for it, is not in harmony with any safe principle. There may be certain cases where there is, of necessity a final discretion; but there can be no absolute discretionary power over private persons and property. They are assured by the law of the land against any improper interference, and no public authority exists which can authorize their immunity to be taken away.

The act complained of here is a forcible taking of private lands for public use, without either compensation, or any steps under the forms of law to determine the necessity of taking them. The only justification of the act must be found in showing them to belong already to a lawfully existing public highway. This is a question of fact, and of private right, and the claimant of the land cannot be deprived, by any power in this State, from having his rights passed upon by the legal tribunals.

There are decisions which hold that when a corporate board has power to establish grades and other public works, merely incidental inconveniences will not authorize their honestly exercised discretion to be disregarded. How far this doctrine can be carried we have no occasion now to consider. The in-

cidental damage which may arise from the vicinity of public improvements, and the imperfections of their plan is very different from the actual invasion of private possessions. There is no case where the actual taking of private property is *damnum absque injuria;* compensation is a constitutional condition of such taking, and it can only be lawful when the necessity of the taking, as well as the measure of compensation, has been determined in a legal way. If a municipal board can finally determine that a highway already exists over private lands, there can be no security whatever against unlawful seizures. It would not only allow interested judges to decide, but it would cut off all appeal from their decisions. In all the proceedings for taking land for streets, in cities and villages, the municipality is regarded as a party litigant. *People v. Brighton*, 20 Mich. R., 57. When the local authorities decide that they desire the way established, they then become petitioners and movers, just as railroad companies do where land is needed for their purposes. The contest is between the city or village and the private citizen, and when the damages are determined, and the land is to be used, the former is responsible for their payment. There would be no more propriety in allowing a corporation to determine for itself that it already owned the way, than in permitting a private person to decide his own action of ejectment.

If the property in dispute is not subject to the public easement asserted, then the village of Kalamazoo has taken possession of property it could not lawfully appropriate without a legal condemnation. There is no authority that we can find which holds such an invasion of private lands not to be an act of the corporation, and none which would exempt the corporation from liability to an action for the wrong. The directions to the marshal came from the authority of the village board, acting as a board, and not as individuals, and all that was done under the resolution was in the course of agency, and not in the distinct exercise of discretionary powers over which the board had no control. None of the persons acting possessed any such discretionary jurisdiction in relation to protecting public ways. The whole control, as already suggested, is given by the charter to the corporate board, and all the parties acted

on that theory. The principle of liability is, therefore, well established on a line of authority which has not been questioned. *Thayer v. Boston*, 19 Pick. R., 511; *Clark v. Washington*, 12 Wheat. R., 40; *Allen v. Decatur*, 23 Ill., 332; *Lee v. Sandy Hill*, 40 N. Y., 442; *Nichols v. Boston*, 98 Mass. R., 39; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y., 465; *Detroit v. Corey*, 9 Mich. R., 165; *Pennoyer v. Saginaw City*, 8 Mich. R., 534.

The very strange course taken by the president and other village authorities threatening the marshal with removal from office unless he should carry out what he supposed to be an unlawful order, was, if it took place as offered to be shown, a great abuse, and indicates the danger of such high-handed proceedings as were attempted in this case. Where a person has been in peaceable possession of lands, under color and claim of right, it is not consistent with legal policy to allow him to be forcibly ejected without legal process. In all cases of encroachment on highways outside of municipalities, provision is made for having the questions disposed of by a peaceable legal proceeding, before any one can be disturbed. The courts have interfered to protect continued possession by the writ of injunction until the right should be tried at law. *Devaux v. City of Detroit*, Harr. Ch. R., 98; *Varick v. Corp. of New York*, 4 J. C. R., 53. And we cannot believe that under the power to pass ordinances to prevent encroachments and compel their removal it was designed that corporations, any more than individuals, should violate the public peace.

We think the judgment should be reversed with costs, and a new trial granted.

The other justices concurred.

A CITY HELD NOT LIABLE FOR INJURY CAUSED BY DISCHARGE OF A ROCKET BY ITS OFFICERS.

THIRTY-THIRD SELECTED CASE.

MORRISON v. CITY OF LAWRENCE.*

If the record of the proceedings of a city council does not show that a vote by which it raised a committee to celebrate a holiday, and provided that the expenses of the celebration should be charged to an appropriation previously made for incidental expenses generally, was taken by yeas and nays, in conformity with the St. of 1861, c. 165, the city is not responsible to a person wounded by a rocket bought by the committee and negligently fired under their direction in celebrating the holiday.

TORT for injury sustained by the plaintiff's intestate, by the negligent firing of a rocket by the defendant's servant.

At the trial before WELLS, J., there was evidence that on the evening of July 4, 1866, on the common in Lawrence, a rocket, fired by the city marshal, or by a policeman detailed by him, hit the plaintiff's intestate and inflicted a wound from which, after some days, he died; and that it was fired as part of a display of fire-works in celebration of the holiday, which were procured and fired under the direction of the mayor, who testified that he acted throughout in his official capacity.

By the official records of the city clerk, which were introduced in evidence, it appeared that on June 18, 1866, an order was adopted by both branches of the city council for the appointment of a joint committee "to cause the approaching fourth of July to be observed in the city with salutes, ringing of bells, music upon the common, and such other manner as they shall deem expedient, and that the expense thereof be charged to the incidental department, and that the committee have full power;" and in pursuance thereof such committee were appointed, with the mayor as their chairman; that their total expenditure for the celebration, including a bill of three hundred and seventy-six dollars for fire-works, was six hundred and forty-six dollars and twenty-four cents, which was less

*98 Mass., 219 (1867).

than one-fiftieth of one per centum of the valuation of the city for the same year; and that the bills were approved by the mayor, the auditor and the committee of accounts, and paid out of an incidental fund of upwards of five thousand dollars appropriated by the city council before June 18, "to which expenses generally were charged for which no other appropriation has been made."

But it did not appear by the records that the order of June 18, was passed by a yea and nay vote, nor how many members of the two branches of the city council, present when it was passed, voted for it; and the city clerk testified that he was also clerk of the board of aldermen at the time of its passage, and as a matter of recollection knew that it was not passed by a yea and nay vote, and further testified that if it had been so passed the fact would appear of record. The plaintiff offered to show by oral testimony that two-thirds of each branch did in fact vote for it; and it was agreed that if such testimony was competent it should be taken to have been so proved.

In behalf of the defendants it was contended, among other things, that these facts showed no lawful authority for the city to celebrate the holiday by discharging these fire-works, and so that the plaintiff could not recover against the city; and the judge reported the case for termination by the full court of this with other questions which are now immaterial, the parties agreeing that if, on the facts reported, the plaintiff could not maintain her action, judgment should be entered for the defendants, and if otherwise the case should stand for trial.

J. G. Abbott & B. Dean, for the plaintiff, argued, on the point of the record, that the provision of the St. of 1861, c. 165, for a yea and nay vote by a city council for appropriating money to celebrate a holiday, is directory only. The right to celebrate the day is given, and the city cannot avail itself of the fact that it did not comply with details, to avoid responsibility to a party injured by the manner in which the corporation did an act within its power; for the plaintiff's intestate had no control over the preliminary proceedings, and could only know that the city had the power, and undertook

to exercise it, and in so doing injured him through negligence of its servants. Further, the statute provides only that the appropriation of money to celebrate a holiday shall be made by a yea and nay vote, and here there was no appropriation of money, necessarily. And besides, the record being silent it is to be presumed that the vote was passed with the requisite formality.

Bigelow, C. J.—A city or town cannot be held liable in damages for the act of a person, unless it appears that the injury was inflicted by a servant or agent of the city or town while engaged in the legitimate exercise of the service or business for which he was employed. Unless this is shown the maxim *respondeat superior* does not apply. *Walcott v. Swampscott*, 1 Allen, 101.

The only authority conferred on a city by which it can legally appropriate money to celebrate a holiday is found in St. 1861, c. 165. Before the enactment of that statute any appropriation of money for such purpose was illegal. *Hood v. Mayor and Aldermen of Lyon*, 1 Allen, 103. The authority given by the statute is a limited one. It can be exercised only in pursuance of a "vote of two-thirds of the members of each branch of the city council present and voting by yea and nay vote." There was no competent evidence at the trial of this case that the city of Lawrence had duly exercised any authority under this statute for the celebration of the fourth of July, when the plaintiff was injured; or that any one was duly empowered to purchase fire-works in behalf of the city to be used in such celebration. The only competent evidence of any such authority is to be found in the records of the proceedings of the city council kept according to the provisions of law. By the act establishing the city of Lawrence, St. 1853, c. 70, §§ 6, 7, 10, it is expressly provided that each board composing the city council shall keep a record of its own proceedings, and that a city clerk shall be chosen who shall be the clerk of the board of aldermen. Parol evidence was inadmissible to prove any acts or proceedings of the city council, or that the record of such proceedings as kept by the clerk was erroneous or defective. *Mayhew v. District of Gay Head*, 13 Allen, 129,

134, and cases cited. There was, therefore, no legal evidence whatever offered by the plaintiff that the defendants had purchased any fire-works, or had authorized any person to use them. The act of the mayor and other officers of the city who undertook to procure them at the expense of the city, were beyond the scope of their official power, or duty, and can in no way be held to be the foundation of charging them in this action. Upon this ground, without determining the question whether the city could be held liable, even if it had appeared that the purchase of the fire-works was duly authorized, the entry must be in conformity to the agreement of the parties.

JUDGMENT FOR THE DEFENDANTS.

NOTES.

In *Harvey v. The City of Rochester*, 35 Barb., 177 (1861), the suit was for the recovery of damages for entering upon the plaintiff's close and breaking down and destroying gates and fences, and tearing down and destroying sheds and buildings thereon erected and being, and taking and carrying away personal property. These acts were done in pursuance of resolutions passed by the common council of the city of Rochester, requesting the superintendent to remove all obstructions from a certain alley in that city, and directing the surveyor of the city to mark the lines of the alley in order to enable the superintendent to remove the obstructions therefrom; and the acts aforesaid, of which the plaintiff complained and for which he claimed damages, were done under a misapprehension that the lands were in said alley as claimed, for the purpose of removing obstructions from the same as requested in the resolutions of the city council. But it was found by the referee that the *locus in quo* was no part of the alley from which the obstructions were directed to be removed, and the plaintiff recovered judgment. On appeal the court observed: "The defendants are a municipal corporation, and the citizens of the city of Rochester are the corporators. The common council is the agent of the corporation and the organ through which it can act. The powers of the common council are limited and defined by law, and it can no more transcend such powers than an agent in any other case can bind his principal by acts beyond the scope of the authority conferred upon him.

"The question in the present case comes to this: have the common council authority by their agents, servants or otherwise, to enter summarily upon premises, within the corporate bounds of the city, which are owned or lawfully and peaceably possessed by another, and commit the tortious acts which

the referee finds have been committed in this case? The mere statement of the question would seem to indicate an answer in the negative. To maintain the affirmative would be monstrous. Most manifestly it has no such power, and the case is one where the acts of the common council were clearly *ultra vires*, and for which their constituent, the corporation, is not liable, even if the ordinance under the authority of which the wrongful acts are alleged to have been done had specifically directed the particular acts complained of to be done."

The fundamental doctrine is here clearly laid down, that if the act complained of is wholly outside of any power or authority of a municipal corporation, as conferred by its charter, the corporation cannot be held liable for the act, even though directed or commanded by its superior agents or officers. This doctrine is sustained by many cases, besides those cited in the foregoing selected case of *Horn v. Baltimore*, 30 Md., 218; *Cuyler v. Rochester*, 12 Wend., 165; Dillon on Mun. Corp., §§ 767, 768, and notes.

The difficulty sometimes lies in determining where the doctrine should apply, that is, in deciding what acts done *colore officii*, or by the direct request or command of the superior agents or officers of the corporation, are *ultra vires;* for municipal corporations have some powers incidental to those conferred, like those of private corporations. *Spaulding v. Lowell*, 23 Pick., 71; *Stetson v. Kempton*, 13 Mass., 272; *Willard v. Newburyport*, 12 Pick., 227.

The case of *Mitchell v. Rockland*, 52 Me., 118 (1860), and the same case in 41 Me., 463; 45 Me., 505, will further illustrate the application of the doctrine to the unauthorized acts of officers or agents of the corporation done in the supposed performance of duty, but by the negligent performance of which another suffers damage. The facts in this case were as follows: The health officers of the city of Rockland took the plaintiff's vessel by consent of his agent for a hospital for a man sick with the small-pox. The sick man died and after his death the health officers sent a man to fumigate the vessel, which he did so negligently that the vessel was set on fire and injured, and the city government paid the charge for cleansing the vessel. The verdict was for the plaintiff, with a special finding by the jury that the defendants had ratified and adopted the acts of the health officers and their servants in taking care of the sick man on board the plaintiff's vessel and in fumigating and cleansing her.

There were three appeals, the court in the last one re-affirming the decisions in the two former cases. In the first case it was held that the health officers of the city were not authorized to take vessels in the quarantine into their own possession and control to the exclusion of the owner or of those whom he has put in charge—and that when such unauthorized possession and control are taken by the health officers or their servants the city is not responsible therefor.

In the second case the court held that the statute of the State gave no authority to the selectmen, or the health committee, who were by the statute clothed with the same authority, to take possession of, or to control or appropriate a vessel, or any portion of the same, as a hospital.

In the last case the court say: "The town or city chooses its health and

police officers in pursuance of the requirements of a statute which prescribes their duties to the public. Neither the relation of master and servant, nor that of principal and agent, exists between them and the municipal corporation to which they owe their election. They are appointed for public purposes. An officer may be liable for negligent or illegal acts to the person injured thereby. But is the town or city a warrantor or guarantor against all the torts or neglects of its police or its health officers? If so, then is the town a surety to the public for every person it may elect that he will perform the duties incumbent upon him, and is responsible in all cases of neglect for his non-performance or his careless performance of such duties. Nor is this all, for, according to the instruction referred to, a town or city is made equally responsible for the good conduct of all persons employed by its officers, and liable for their misfeasance or nonfeasances."

In *Hafford v. New Bedford*, 16 Gray (82 Mass.), 297, the action was for an injury sustained by the plaintiff while on a sidewalk in the city of New Bedford, through the negligence and carelessness of the defendant's servants in the management and use of a hose-carriage. The judge before whom the case was tried, made the following report thereof: "The writ, declaration and answer are to be referred to and made a part of the case. The plaintiff offered evidence tending to show that at the time stated in the declaration, in the evening, he was walking along on the flagged sidewalk on Purchase street, in said city, and was using due care and diligence, when there was an alarm of fire, and certain members of the fire-department of said city (appointed and paid for their services, as by the city ordinances, to be referred to, is provided), upon a fast run, drew a hose-reel belonging to the city along upon the sidewalk, and therewith struck the plaintiff with great violence, throwing him down, running over him, and injuring him severely. Evidence was offered tending to show that said members of the fire-department, as aforesaid, at the time the plaintiff was so struck down, as aforesaid, had been drawing said hose-reel upon the sidewalk from the time they had taken it from the engine-house, a distance of some ten or fifteen rods. Upon this evidence, the court being of opinion that the action could not be maintained, the case was withdrawn from the jury, to be submitted to the whole court. If the whole court are of opinion that the action cannot be maintained, judgment is to be rendered for the defendants; otherwise, the case is to be sent back for a trial by the jury."

The whole court of Massachusetts at that time (1860) consisted of BIGELOW, C. J., and DEWEY, METCALF, MERRICK, HOAR and CHAPMAN, judges. They held that "where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community, such officer cannot be regarded as a servant or agent for whose negligence or want of skill in the performance of his duties a town or city can be held liable. The acts proved at the trial fall within this principle, and are not such as to render the defendant liable to an action. The members of the fire-department of New Bedford,

when acting in the discharge of their duties, are not servants or agents in the employ of the city for whose conduct the city can be held liable; but they act rather as officers of the city, charged with certain public duty or service; and no action will lie against the city for their negligence or improper conduct while acting in the discharge of their official duty."

Municipal corporations are not usually liable for the negligent performance of duties, or for an omission to perform those which are imposed upon them without their assent for public purposes, unless a right of action therefor is conferred by statute. Thus, where a town assumed the duties of a school-district, and an injury was sustained by a scholar attending a public school from a dangerous excavation in the school-yard, caused by the negligence of the town officers, it was held that no private action could be maintained therefor against the town. *Biglow v. Randolph*, 14 Gray, 541; *Ogg v. City of Lansing*, 35 Iowa, 495. So where a building had been erected by a town for a town house and being carelessly and imperfectly erected, the floor gave way, during a town meeting held in it, whereby the plaintiff was injured, it was held that he could not recover therefor against the town. *Eastman v. Meredith*, 36 N. H., 284. See, also, *Brown v. South Kennebeck*, Ag. Soc., 47 Me., 275.

So where a town voted to pay the expenses of a field driver, in defending a suit brought for taking up and impounding cattle running at large contrary to law, it was held that it was not within the scope of the town's corporate powers to agree to indemnify the plaintiff, or pay the expenses of the suit, and that the plaintiff could not recover thereon. *Vincent v. Nantucket*, 12 Bush., 103. See, also, *Anthony v. Adams*, 1 Met., 284; *Riddle v. Proprietors*, 7 Mass., 169; *Mower v. Leicester*, 9 Mass., 247; *Farnum v. Concord*, 2 N. H., 392; *Baxter v. Winooski*, 27 Vt., 123; *Prather v. City of Lexington*, 13 B. Mon., 559. So a city is not liable for an assault and battery committed by its police officers in the discharge of their duty. *Calwell v. City of Boone*, 51 Iowa, 688; *Town of Odell v. Schroeder*, 58 Ill., 353. Nor would the action of a city in authorizing and employing its solicitor to appear and defend an action brought against a police officer for such an assault and battery make it liable therefor. *Buttrick v. Lowell*, 1 Allen (83 Mass.), 172; *Perley v. Georgetown*, 7 Gray, 464. Nor is a town liable for the negligence of a laborer employed by one of the highway surveyors, to aid him in performing the duties of his office. *Walcott v. Swampscott*, Id., 100.

Nor can a municipal corporation be made liable for the wrongful arrest and imprisonment by its collector for non-payment of taxes, illegally included in his warrant, although it afterward pays the collector's fees for serving the warrant, and the constable's fees for serving and executing the warrant, and jailor's charges for the board and maintenance of the plaintiff while detained in custody. *Perley v. Georgetown*, 7 Gray (73 Mass.), 464 (1866).

In *Elliott v. The City of Philadelphia*, 75 Pa. St., 347 (1874), the action was brought for the arrest by defendant's police officers of plaintiff's servant for fast driving, taking his horse into custody and negligently permit-

ting it to run away and be killed. There was a demurrer to the declaration and a judgment for the defendant on the demurrer.

On error, it was held that the city was not responsible for the negligence of the police; that the officers of a city are *quasi* civil officers of the government, although appointed by the corporation; and that where the city only authorizes a lawful act to be done in a lawful manner, it is not liable for the acts of its officers outside of the authority.

When the collection of municipal ultra vires taxes may be enjoined.—In *Mayor and City Council of Baltimore v. Porter*, 18 Md., 284 (1862), to which reference is made in the foregoing selected case of *Horn v. Mayor, etc., of Baltimore*, the facts were these. North Avenue formed the northern boundary of the city of Baltimore, the land on the south side thereof lying in the city, that on the other side in Baltimore county. In 1856 a special act of the legislature of Maryland was passed providing for the grading and paving of the avenue. The act provided "that on the application in writing, of a majority of front feet of the owners of the land in Baltimore county, and in the city of Baltimore, fronting on said avenue, or on any part thereof, to the mayor and city council of Baltimore, to have the same, or such part thereof as such majority may apply for, graded, or paved, or both graded and paved, they shall have full power and authority (if in their opinion consistent with the public good) to allow the same and to provide for ascertaining whether any, and what amount, of benefit or *damage* will be caused thereby to the owners of the land on each side of said North Avenue, both in said city and Baltimore county, for which said owner or owners should be compensated, or ought to pay a compensation by reason of the grading, or paving, or both, as aforesaid; and to provide for assessing and levying on the property of the persons benefited within the same limits, the expenses which may be incurred in the grading, or paving, or both, of said North Avenue, or any part thereof as aforesaid, in the same manner as is now provided by existing laws and ordinances for the grading and paving of streets in the city of Baltimore."

A number of proprietors of land, including the complainant, representing themselves to be the owners of a majority of feet fronting on this avenue and between Pennsylvania Avenue and the Falls Turnpike Road, made application in writing to have the same graded between those points.

The city commissioners, acting for the council, resolved to grade the same, advertised for proposals and awarded the contract to W. Slater. They assessed and levied the tax and placed the list in the hands of the city collector, who advertised the complainant's property for the non-payment of the same. The contractor completed the grading at a cost of over $100,000. The complainant instituted no proceedings to stop the progress of the work, and made no objection to it while it was in progress. The mayor and city council, after the work was completed, adopted an ordinance approving what had been done on the part of the city officers and the contractor, and declaring the work done consistent with and for the public good.

The complainant filed a bill for an injunction to restrain the defendants from selling his land for the payment of the taxes.

An injunction was granted, from which an appeal was taken, and on the appeal it was made perpetual.

In delivering the opinion of the court GOLDSBOROUGH, J., observes: "Being a work of great magnitude and expense, involving not only private interests, but also of public concern, the act requires that the mayor and city council shall first determine that it is 'consistent with the public good.' No such preliminary determination was made, nor was the application addressed to them or any action had by them upon the subject. Under these circumstances it is impossible to say that the action of the city commissioner was authorized by any law or ordinance, without which the payment of the tax assessed by him cannot be enforced by the sale of the appellee's property."

A contract for grading, ultra vires where the precedent conditions of the statute are not complied with.—In *City of Baltimore v. Eschbach*, 18 Md., 276, it appears that the legislature of Maryland had conferred upon the mayor and city council of Baltimore full power and authority to pass all ordinances necessary to provide for the grading and paving of its streets, and in the execution of this power they imposed certain specified duties upon the city commissioner in reference to such grading and paving.

Under this ordinance the city commissioner, with the approbation of the mayor, was vested with the power and authority to enter into and make contracts for grading and paving streets, alleys and lanes, and to assess taxes therefor, in two classes of cases; first, when the proprietors of a majority of the feet of ground being and fronting on any condemned street, lane or alley, make application to him in writing therefor; and second, when all the proprietors of the ground fronting on a street, lane or alley not formally condemned, make like application.

Under this order the city commissioner, with the approbation of the mayor, determined to grade and pave Hull street, from Fort Avenue to Port Warden's line, upon an application made by a majority of the front feet of the ground lying along the same, although the street had never been formally condemned by the mayor and city council. A contract was entered into between the city and Eschbach, the defendant in error, for the latter to do the work, which was duly approved by the mayor and the city commissioner, acting for the city council. A tax was duly levied and the said Eschbach paid thereby for the work done, except the sum of $4,516, which was assessed to certain owners of ground bordering on the street, and not paid, on the ground that there had been no proper application for the grading and paving. Under these facts Eschbach brought the suit against the city to recover the balance due and recovered judgment therefor, from which an appeal was taken by the city.

COCHRAN, J., on appeal, observed: "As it is admitted in this case that Hull street, from Fort Avenue to Port Warden's line, was never formally condemned, and that the application to have it graded and paved was made by only a part of the proprietors of the ground being and fronting thereon, it is obvious that the application was not sufficient to bring the case within the jurisdiction conferred by the ordinance on the commissioner, nor to give him any official discretion or authority to take any proceedings or make any

contract respecting it. The fact that the contract made related to a subject within the general scope of his powers does not make it obligatory on the appellants, if there was a want of specific power to make it.

"Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal the rule as to the effect of a like act of a public agent is otherwise."

The judgment in this case was therefore reversed.

In *Hones v. The City of Baltimore*, *supra*, it was held that the city was not liable for damages caused by grading an avenue, which it was authorized to grade after certain precedent conditions had been complied with; viz., a determination on the part of a mayor and city counsel that it was "consistent with the public good." The work was done with their approval, and a resolution subsequently adopted by the mayor and city council recited that they approved of the same, and that it was "consistent with the public good."

In *Sheldon v. Kalamazoo*, *supra*, the action was for an injury sustained by an invasion of the private property of the plaintiff, within the corporate limits, by the officers of the corporation under a resolution passed by the trustees of the corporation when they were duly assembled, directing the removal of fences on lands of the plaintiff, on the ground that they were within the limits of a highway, or street of the village, and over which they had control. It was held that the corporation was liable for the damage.

In *Thayer v. City of Boston*, *supra*, the city was held liable in an action, sounding in tort, for an injury sustained by the obstruction of a highway or street, existing only by prescription, even where the acts by which the injury was sustained were done by the agents of the city, either by express direction or by subsequent approval, and the damage done was to adjoining proprietors of the real estate.

The distinction drawn between the case of *Horn v. The City of Baltimore*, and the other selected cases is exceedingly fine. That case turned upon the question whether the city council had determined that the grading to be done was "consistent with the public good," before the contract for the grading was entered into. They had not adopted a resolution or ordinance to that effect before that time, although it appears from the case as reported that the commissioners acted for the council in advertising proposals for the work and entering into the contract, and that it was in fact approved by the mayor; and that subsequently the mayor and the city council, by a formal resolution, approved and indorsed what had been done, and declared that it was "consistent with the public good."

The city and the complainant had received the benefit of the contract, and the complainant had been one of the petitioners to the mayor and the city council to have the grading done, and it would appear that he could not equitably claim the interposition of a court of equity to restrain the collection of taxes levied for the purpose of paying for the grading which he had asked to have done.

In this case the mayor and city council were the judges of the question presented for their determination by the act of the legislature, authorizing action on their part in the premises; viz., whether it was "in their opinion

consistent with the public good." Now this opinion was not required to be expressed by resolution of the mayor and city council by a formal action at a regular meeting. It appears that they did act in the premises, and from their action it might well be inferred that they did determine that in their opinion it was "consistent with the public good."

This view of the case finds support in the leading cases, in the last chapter.

The general liability of corporations for torts.—The doctrine is well established that a corporation is liable for all kinds of torts committed by them, or their agents in the course of their duties, although it is not a part of their business to commit torts. The remedy of a person injured by a wrongful act of a corporation or its duly appointed agents, when acting within the line of their duties and within the authority and powers of the corporation, is as full and complete as if the wrong had been committed by an individual.

Corporations may, under such circumstances, be sued in the proper form of action for a conversion, trespass *quare clausum fregit*, or a trespass *vi et armis*. *State v. Morris & Essex R. Co.*, 23 N. J. L., 367; *Brokaw v. N. J. R. & T. Co.*, 32 Id., 32; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend., 9; *Hayes v. Cohoes Co.*, 3 Barb., 42; *Watson v. Bennett*, 12 Id., 196; *Lee v. Sandy Hill*, 40 N. Y., 442; *Del. Canal Co. v. Commonwealth*, 60 Pa. St., 367; *Terre Haute Gas Co. v. Teel*, 20 Ind., 131; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill., 105; *Chicago & Iowa R. Co. v. Davis*, 86 Ill., 20; *Hazen v. Boston R. Co.*, 2 Gray, 574; *Lyman v. Bridge Co.*, 2 Aik. (Vt.), 255.

They are also liable for an assault and battery, and other injuries to the person done by officers or other agents while acting within the apparent scope of their authority. *Pennsylvania R. Co. v. Vandirer*, 42 Pa. St., 365; *Evansville R. Co. v. Baum*, 26 Ind., 70; *Jeffersonville R. Co. v. Rogers*, 38 Ind., 116; *Kline v. Central P. R. Co.*, 39 Cal., 587; *St. Louis A. & C. R. Co. v. Dalby*, 19 Ill., 353; *Ramsden v. Boston & A. R. Co.*, 104 Mass., 117; *Coleman v. N. Y. & N. H. R. Co.*, 106 Mass., 160; *Jackson v. Second Av. R. Co.*, 47 N. Y., 274; *Hamilton v. Third Av. R. Co.*, 35 N. Y. Superior Ct., 118; s. c., 53 N. Y., 25; *Phil. R. Co. v. Derby*, 14 How., 468; *Turner v. N. B. & N. R. Co.*, 34 Cal., 594; *Hayes v. H. G. N. R. Co.*, 46 Tex., 272.

It is the duty of corporations to supply their servants with sound mechanical contrivances and accompany them with competent persons to use them, and if the officers or other agents whose duty it is to supply these fail so to do, the corporation may be liable for injuries to other servants and agents caused thereby. *Laning v. N. Y. Cent. R. Co.*, 49 N. Y., 521; *Ford v. Fitchburg R. Co.*, 110 Mass., 260; *Cooms v. New Bedford Cordage Co.*, 102 Mass., 433; *Brickner v. N. Y. Cent. R. Co.*, 49 N. Y., 672; *Hofnagale v. N. Y. C. & H. R. Co.*, 55 N. Y., 611; *Malone v. Hathaway*, 64 N. Y., 9; *Booth v. B. & A. R. Co.*, 73 N. Y., 38; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St., 104; *Chicago & N. W. R. Co. v. Swett*, 45 Ill., 197; *Same v. Taylor*, 69 Ill., 461; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Id., 109; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Cook v. Han. & St. J. R. Co.*, 63 Mo., 397; *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis., 289; Field on Corp., Ch., XII; Field on Damages, Ch. XXII. And a corporation may be also liable for a mali-

cious prosecution. *Vance v. Erie Railway Co.*, 32 N. J. L., 334. And for false imprisonment, *Owsley v. Mont. & West Point R. Co.*, 37 Ala. (N. S.), 560. See, also, *Merills v. Tariff Man. Co.*, 10 Conn., 384; *Jefferson R. Co. v. Rogers*, 28 Ind., 7; *Vinas v. Merchants' Ins. Co.*, 27 La. Ann.. 368; *Hewett v. New Orleans, etc., R. Co.*, 28 Id., 685; *Gillett v. Missouri Valley R. Co.*, 55 Mo., 315. But see, *contra*, *Cumberland & O. Can. Co. v. Portland*, 56 Me., 78; *Childs v. Bank of Mo.*, 17 Mo., 213.

Corporations are also liable in damages for the publication of a libel. *Aldrich v. Press Co.*, 9 Min., 133; *Daily Post Co. v. McArthur*, 16 Mich., 447; *Hovey v. Rubber Co.*, 57 N. Y., 119; *Hahnemannian Ins. Co. v. Beebe*, 48 Ill., 87; *P. W. & B. R. Co. v. Quigley*, 21 How., 202; *Howe Machine Co. v. Louder*, 58 Ga., 64.

Where the tort is ultra vires.—There seems to be some conflict in the authorities, both American and English, on the question whether a corporation can be made liable for a tort committed *ultra vires*. In the cases we have selected for this chapter it will be noticed there seems to be a diversity of opinion.

In *Harmen v. Lappenden*, 1 East., 555, the corporators were held personally liable for an *ultra vires* tort, committed in the name of the corporation; and in *Mill v. Hawker*, L. R., 9 Ex., 309, the agents of the corporation were held personally liable for carrying out an *ultra vires* order of the corporate board, although KELLY, C. B., gave a dissenting opinion that the corporation was alone liable.

In *Hutchison v. Western, etc., R. Co.*, 6 Hisk., 634, it was held, in an action to recover damages for an injury occasioned by the negligence of the employes of the railroad company, that the fact that the act from which the injury was received was not authorized by the charter, was no defense if the corporation recognized the act as done in its business. See, also, selected cases and notes Ch. III; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y., 30; *Life & Fire Ins. Co. v. Merchants' Fire Ins. Co.*, 7 Wend., 31; *Goodspeed v. East Haddam Bank*, 22 Conn., 541; *Green v. London Omnibus Line Co.*, 7 C. B. (N. S.), 290; *Frankfort Bank v. Johnson*, 24 Me., 490; *Phil. & B. R. Co. v. Quigley*, 21 How., 202.

In *N. Y. & N. H. R. Co. v. Schuyler, supra*, Judge DAVIS, who gave the opinion of the court, lays down this broad proposition: "A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and it will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be." See, also, *Nolton v. Western R. Co.*, 15 N. Y., 444; *Denny v. Manhattan Co.*, 2 Den., 118; *Kortright v. Buffalo Com. B'k.*, 20 Wend., 94; *Smith v. Rathbun*, 66 Barb., 402; *Brown v. South Kennebec Ag. Soc.*, 47 Me., 275; *Railway Co. v. Anthony*, 43 Ind., 183; *Harlam v. Emert*, 41 Ill., 320; *Pittsburgh, etc., R. Co. v. Slusser*, 19 Oh. St., 157; *Atlantic R. Co. v. Dunn*, Id., 162; *Hooker v. New Haven & N. Co.*, 15 Conn., 321; *Ranger v. The Great Western R. Co.*, 5 H. L., 86; *Davis v. Bank of Eng.*, 2 Bing.,

393; *Yarborough v. Bank of Eng.*, 16 East., 6; *MacKay v. Colonial Bank*, L. R., 5 C. P., 394; 30 L. T. (N. S.), 180; 22 W. R., 473.

The opinion in these cases related to the liability of private corporations, and unless there is a distinction to be made between private and municipal corporations in respect to *ultra vires* torts, they will appear to be in conflict with some of those relating to the liability of the latter, especially those of the highest court of Maryland herein before cited.

CHAPTER XIII.

AGENT NOT LIABLE ON ULTRA VIRES CONTRACT.

THIRTY-FOURTH SELECTED CASE.

McCurdy v. Rogers.*

Contract by agent in name of principal; when agent is bound—Contract of public officer.

1. An agent, who promises in the name of his principal, does not in all cases bind himself if he fails to bind the principal.

2. To make the agent personally liable where he does not so intend, and the credit is not given to him, there must be some wrong or omission of duty on his part, such as affirming that he had authority, when he knew or ought to have known that he had not; or a failure to disclose facts within his knowledge.

3. In the case of a public agent, where his authority, or that of his principal, to contract, is derived from a public statute, the party contracted with is presumed to know the limitations of such authority; and the doctrine that an agent, by contracting for his principal, affirms his authority, does not apply.

4. The agent is not in any case liable in an action *ex contractu*, unless the credit has been given to him, or he has expressly agreed to be liable; and if there is a *written* contract it must contain apt words to charge him.

5. There is a strong presumption of law against any credit having been given to a public agent acting within the scope of his authority; and if, in a case where he acted beyond his authority, the defect of the authority was known to the other party, *it seems* that the same presumption lies against the liability.

* Reported in 21 Wisconsin, 197 (1866).

6. Where defendant, as chairman of a town board of supervisors, obtained a recruit to be credited to the town, upon promise of a certain sum as town bounty, he acted as a public agent, and if the amount promised exceeded that which the town was authorized by law to pay, his personal liability is to be determined by the principles above stated.
7. If otherwise liable, defendant was entitled to show as a defense, that he was not notified within a reasonable time that such recruit had been accepted and credited to the town.

Appeal from the Circuit Court for Winnebago County.

ACTION for bounty money. The plaintiff sued as assignee of one Lent, and averred that defendant, on the 30th of August, 1864, at the city of Oshkosh, agreed with Lent to pay him $300 if he would be mustered into the military service of the United States and credited to the *town* of Oshkosh; and that Lent duly performed said conditions on the 8th of September following. Answer in denial. The plaintiff's evidence tended to sustain his averments. The defendant's evidence tended to show that he made the contract as chairman of the town board of supervisors, and that this was known at the time to Lent; that the only conversation he ever had with Lent was about the 20th of August, 1864; that Lent did not at that time say whether he would accept the amount proposed by defendant, or any other sum, and never had notified defendant that he had been credited to the *town* of Oshkosh, nor did defendant know of that fact until the subsequent winter or spring; that sometime in September, 1864, the plaintiff (who was treasurer of the *city* of Oshkosh) told him that Lent was credited to the city; that defendant had means in his hands at the time of his conversation with Lent to pay what he had proposed; and that if Lent had credited himself to the *town* of Oshkosh, and notified defendant at any time while he was chairman, he could have paid him. The court refused to let the defendant show, either that before he had any knowledge that Lent had credited himself to the town; to-wit., in November, 1864, upon retiring from his office as chairman, he had a settlement with the proper authorities of the town, and did not retain in his hands any money to pay Lent for his credit to said town; or that, before he had any notice of the assignment of said claim to the plaintiff "Lent informed him

that he supposed he had credited himself to the *city* of Oshkosh, but by mistake was credited to the *town*." It instructed the jury that if defendant, as chairman, etc., agreed to pay for said town to said Lent $300 for his credit, the contract was not binding upon the town, and the defendant was liable therefor personally. It further instructed them, *inter alia*, that if the defendant offered Lent to pay him a certain sum if he would credit himself to said town, and Lent did not accept the offer, defendant was not liable, even if Lent did subsequently credit himself to the town, unless defendant knew of such crediting and adopted it.

Verdict for plaintiff for $233; motion for a new trial, on the ground (among others) that the court erred in instructing the jury, denied; and the defendant appealed from a judgment on the verdict.

Gab. Bouck, for appellant, to the point that if defendant made the contract alleged as agent for and in behalf of the town, without authority to bind it, the plaintiff could not recover on the contract, but only by a special action on the case, cited 2 Kent's Com., 631–32; Story on Agency, § 264, *a; Fowles v. Shearer*, 7 Mass., 14, 19; *Stinchfield v. Little*, 1 Greenl., 231; *Hopkins v. Mehaffy*, 11 S. & R., 126; *Townsend v. Corning*, 23 Wend., 435; *Long v. Colburn*, 11 Mass., 97; *Harper v. Little*, 2 Greenl., 14; *Stetson v. Patten*, 2 Id., 358; *Abbey v. Chase*, 6 Cush., 54; *Ballou v. Talbot*, 16 Mass., 461; *Delius v. Cawthorne*, 2 Dev., 90; *Ogden v. Raymond*, 22 Conn., 383; *Polhill v. Walter*, 3 Barn. & Adolph., 114; *Dourunan v. Jones*, 9 Jurist, 454; 12 Eng. L. & E., 433. An agent who acts without authority is personally liable only when his want of authority is unknown to the other party. Story on Agency, § 264; *Jenkins v. Atkins*, 1 Humph., 294, 299. A public officer, in making a contract, is not personally liable because he does not so contract as to give a cause of action elsewhere, unless guilty of fraud or misrepresentation. 2 Kent, 633; Story on Agency, §§ 287–8, 302, 306; *Ogden v. Raymond*, 22 Conn., 379; *Tobey v. Claflin*, 3 Sumner, 379; *Parrott v. Eyre*, 10 Bing., 283; *Hodgson v. Dexter*, 1 Cranch, 345; *Mackbeth v. Haldiman*, 1 Term, 172; *Unwin*

v. Wolsely, Id., 674; *Gridley v. Lord Palmertson*, 3 Brod. & Bing., 275; *Brown v. Austin*, 1 Mass., 208; *Daws v. Jackson*, 9 Id., 490; *Adams v. Whittlesey*, 3 Conn., 560; *Stinchfield v. Little*, 1 Greenl., 231; *Entoe v. Hall*, 1 Humph., 303. The chairman of a town board of supervisors is a public officer. *Ogden v. Raymond*, 22 Conn., *supra; Tutt v. Hobbs*, 17 Mo., 489; *Olney v. Wickes*, 18 Johns., 124; *Adams v. Whittlesey*, 3 Conn., 564; *Perry v. Hyde*, 10 Id., 338; *Sterling v. Peet*, 14 Id., 248; *Johnson v. Smith*, 21 Id., 627.

Jackson & Halsey, for respondent.

The chairman of the board of supervisors is not authorized to make any contract in behalf of his town. A quorum of the board only can act. R. S., Ch. 15, Sec. 65. The contract alleged in the complaint could not have been made even by a quorum; because the law authorizing towns to pay bounties limits them to $200. The defendant was therefore liable personally. Story on Agency, §§ 280, 282, 283, 285-6 *a*, 166-7, 172, 175, 264, 269; 7 Wend., 315; 11 Id., 479; 6 Cow., 354; 3 Johns. Cas., 70; 15 Johns., 44; 18 Id., 363; 2 Id., 48.

DOWNER, J.—The first question is: Did the county court err in instructing the jury "that if they found from the evidence that the defendant, as chairman of the board of supervisors of the town of Oshkosh, agreed to pay for said town to said Lent $300 for his credit, the contract was not binding upon the town, and the defendant was liable therefor personally?" The town was authorized by law to pay only $200 bounty to each volunteer; and if the defendant, as agent of the town, promised to pay more than that sum, the promise was not binding on the town. The principle of the instruction is, therefore, that an agent who does not give a cause of action against his principal, is *of necessity* personally liable. This is generally so. Is it so in all cases? Is it so in this? Was there sufficient testimony to base the instruction upon?

It was held in *Smout v. Ilberry*, 10 Mees. & Wels., 1, that where the wife, acting as agent for her husband, had an original authority, which had been revoked by the death of the

husband, unknown to her, she was not liable by reason of making a void contract in his name after his death. The well-reasoned opinion of the court in that case leads to the conclusion, that to make any agent personally liable, where he does not intend to be, and the credit was not given to him, there must be *some wrong or omission of right* on his part, such as asserting that he had authority when he knew or ought to have known he had not, or a failure to disclose fully all the facts within his knowledge. To the same effect is *Ogden v. Raymond*, 22 Conn., 384. See also Story on Agency, §§ 265, 287. It is not claimed that the appellant made any false representations to Lent, or practiced any decèption upon him, unless it was done by making a promise in the name of the town which he had no authority to make. His assuming to make a contract which he had no authority to make would ordinarily, in the case of private agents, be equivalent to a representation that he had authority to make it. But not so in this case; or, if so, its falsity was known at the time to Lent. For the authority which the town had was by virtue of a general statute law, which both parties alike are presumed to know. A representation made by the defendant to Lent, and at the time known by him to be false, of course could not be relied on by him, and could not be a wrong to the injury of Lent. The complaint is in assumpsit, and the instruction, taken in connection with the complaint, assumes or is to the effect that if the defendant promised as agent for and in the name of the town, and that promise is void as to the town for want of authority in the agent to make it, it became the individual promise of the agent, on which he was liable in this action. We do not see on principle how an agent can be liable on any contract, unless there are apt words to charge him, or how a promise on his part can be implied, unless the credit was given to him. The authorities are somewhat conflicting as to the liability of an agent in actions *ex contractu;* but the weight of authority we think is, that to charge an agent in such action the credit must have been given to him, or there must be an express contract, and if there is a written contract there must be apt words in it to charge him. See Story on Agency, § 264 *a*, and note; *Ogden v. Raymond*, 22 Conn.,

384, and authorities there cited. If there are not apt words to charge the agent, and the credit is not given to him, then he is liable only in an action *ex delicto*.

It is said that this leads or may lead in this action to the conclusion that no one is liable; for the town is not. This may be so. But we do not think, if it be so, that it affords us a sufficient ground for holding the defendant liable, unless his acts bring him within the principles we herein lay down. If the defendant had stipulated with Lent that he should not be personally liable, it is clear that, in the absence of fraud on his part, no personal liability would rest on him.

According to the authorities cited by the appellant's counsel, if he was chairman of the board of supervisors, the defendant was a public agent. The law raises a very strong presumption against any credit being given to a public agent, acting within the scope of his authority, and requires a clear intention on his part to charge himself, to make him personally liable. This presumption of the law is equivalent to an implied agreement that he shall not be liable while acting within his authority. If he acts in a case where he has no authority, and fully discloses to the party with whom he is acting his want of authority, or the want of authority is known to such party, and he does not exact the individual undertaking of the agent, we see not why the same presumption should not then be raised against the liability of the agent as when he was acting within the scope of his authority. Why should a public agent in such case be presumed to make himself personally liable, and trust to the government for remuneration, rather than a presumption be raised that the party with whom he is dealing was to trust the government? Both know the government is not bound; and if the party contracting with the agent desires him to be personally bound, it appears to us not unreasonable that he should so expressly stipulate.

The instruction was erroneous; because the defendant, if he acted as a public agent, was not *ex necessitate* liable by reason of transcending his authority under the circumstances of this case, either in an action *ex contractu* or *ex delicto*.

We think also the admissions Lent made before the assignment of his claim should have been received in evidence.

After a careful examination of the testimony, we do not find any evidence that Lent ever notified the defendant that he had, in pursuance of the alleged agreement, enlisted and credited himself to the town, or that the defendant, for at least six months after the enlistment, knew of such credit. Such notice should have been given within a reasonable time after the enlistment, or the defendant might have regarded the contract as broken on the part of Lent, and no longer binding on himself. We doubt whether, for the want of such notice, any cause of action whatever was proved against the defendant. But if there was sufficient testimony to go to the jury (which we do not decide), the defendant should have been permitted to show as a defense that he had been injured by want of notice of the credit to the town within a reasonable time.

By the Court.—Judgment of the county court reversed, and a *venire de novo* awarded.

WHERE AN AGENT MAY BE LIABLE. ACTION FOR MONEY HAD AND RECEIVED.

THIRTY-FIFTH SELECTED CASE.

JEFTS AND WIFE v. YORK.*

A promissory note, in the body of which A. promises to pay a certain sum, and signed "B., agent for A.," does not bind B. personally on the contract, although he had no legal authority from A. to give such note.

In this Commonwealth, a congregational church, or a church formed within the congregation by covenant and according to usage, to celebrate the Christian ordinances, and for ecclesiastical purposes, with deacons chosen by the members, is not a corporation, and cannot authorize an agent to bind them by a promissory note in their associate capacity.

If the consideration of a note by an agent is money advanced to him for the use of his principal, under a mutual mistake of the legal capacity

* Reported in 10 Cush. (64 Mass.), 392 (1852).

of the principal to authorize the giving of such note by his agent, and the lender, finding that neither the principal nor the agent are legally bound upon the note, demands the money of the agent before it is paid over to his principal, he may recover it of the agent, in an action for money had and received.

ASSUMPSIT upon the money counts, with a specification of claim, under the count for money had and received, for one hundred dollars and interest, which the female plaintiff while sole, by the name of Betsey Tilton, advanced to the defendant, October 14, 1842.

At the trial in the court of common pleas, before MELLEN, J., the plaintiffs produced and relied upon a note, of the following tenor:

"$100. "LOWELL, October 14, 1842.

"For value received, the pastor and deacons of the First Freewill Baptist Church in Lowell, in behalf of said church, promise to pay Betsey Tilton, or her order, the sum of one hundred dollars; to be paid in two years, if called for, by giving one month's notice, with interest annually.

"S. D. YORK,

"*Agent for the First Freewill Baptist Church in Lowell.*"

In addition to the note, the signature to which was admitted, the plaintiffs proved an oral admission by the defendant of his receipt of the money, and that he expected to pay the note, at a month's notice.

The defendant contended that he signed said note merely as agent of the said church, a religious association of individuals, or as agent of the pastor and deacons of said church, and that being duly authorized so to do, he was not personally liable on the note; and he offered evidence tending to show the votes of said church, directing him to give the note in suit. The particulars of this testimony, as also several other questions raised at the trial, did not become material to the final decision of the case. Upon the whole evidence, the presiding judge instructed the jury, among other things, that the note in suit was, in its legal construction, the note of the church, and that, as no authority had been shown in the

church to give such note, the defendant acted therein without legal authority; and that the defendant, if he received the money himself, would be liable under the count for money had and received, and the jury returned a verdict for the plaintiffs. To this ruling the defendant excepted.

SHAW, C. J.—We suppose this is the same case in which a new trial was formerly ordered, which is reported in 4 Cush., 371. The object of this suit is to charge the defendant personally, in consequence of his having received of the female plaintiff, whilst sole, the sum of $100, by way of gift, deposit or loan, for the Freewill Baptist Society, upon which he gave her a note or memorandum in writing, as stated in the report referred to. We say gift or loan, because, by the terms of the note, it was only to be paid, if called for.

The former decision only determined that, by the law of Massachusetts, contrary to the rule in some other States, a person, professing to act as agent for another party, but either in law or in fact having no authority to bind such party, he does not necessarily bind himself.

In the present case, it seems to have been assumed, and if it had not, it seems to us clear, as matter of law, that the church or the deacons of the church, had no authority to give a promissory note, or enter into an executory contract for the payment of money, binding upon themselves and their successors, in their corporate capacity. This appears to be the case of a regularly incorporated religious society, in its nature and constitution congregational, a church formed within the congregation, by covenant and according to usage, to celebrate the Christian ordinances, and for purposes purely ecclesiastical, with deacons chosen by the members. It has often been held in this Commonwealth, that such a church is not a corporation, and can neither contract nor sue in a corporate capacity. And although the deacons are vested by statute with limited corporate powers to take gifts and donations and hold property in succession, for the benefit of the church, yet we are not aware of any authority they have to issue promissory notes, to bind their successors or the church, or to enter into executory contracts, negotiations, or speculations, although

they may hope and expect that they will prove profitable to the church. Perhaps it may be thought that the court adopted a different rule, in regard to this same society, in the case of *Townsend v. Freewill Baptist Society*, 6 Cush., 279. But it will be found on examination, that the suit there was brought against the incorporated society, by the name of the Freewill Baptist Church, or, if in fact it was intended to charge the church proper, the plaintiffs had declared against them as a corporation, the defendant had not pleaded in abatement, or given the necessary notices to traverse and try the fact of their being a corporation, so that the suit proceeded against them as a corporation. We then are brought back to the question whether the agent is personally liable. The court are of opinion that where a person acting as agent borrows money for his principals, and gives their obligation for it, and it turns out that the principals were not of legal capacity to make such contract, and of course could confer no such power on another, the agent is not personally liable on the contract, as his contract. This in effect was before decided in the same suit between these parties. 4 Cush., 371; *Abbey v. Chase*, 6 Cush., 54.

But if in fact he was not so authorized, but under a belief that he was, and acted on such belief, and the party advancing the money did not know that he was not authorized, the agent would be liable in an action of the case, to an amount in damages equal to the sum advanced. If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort. *Smout v. Ilberry*, 10 Mees. & Welsb., 1; *Jenkins v. Hutchinson*, 13 Ad. & El., N. S., 744.

But if the defect of authority arises from a want of legal capacity, and if the parties act under a mutual mistake of the law, and are both equally well informed in regard to the facts, so that the lender is not misled by any word or act of the

agent, he would have no legal remedy against the agent; not in assumpsit, for it is not his contract; not in tort, for he is chargeable with no deceit. It is the ordinary case of a person lending money to any aggregate body of individuals not incorporated, associated temporarily for any purpose of business, who by a vote of the majority engage to repay him, he erroneously supposing that they are all legally bound. He can have no remedy against them, simply because, by a fixed rule of law, an aggregate body, not incorporated, cannot act and bind the association by a majority, or sue, or be sued, in an aggregate capacity.

But it is then contended, that the defendant is liable to the plaintiffs as for so much money had and received by him to their use; and there is a count in the declaration, sufficient to enable the plaintiffs to recover in this suit, if their proof will warrant it. There is a state of facts, which, if it existed, might lay the foundation for such a right to recover the money back. In the case supposed, of a receipt of money for another party under a mutual mistake of the law, and a belief, on the part of both, that the agent had authority to bind the principal by a contract, if before the agent has paid over the money or applied it to the use of his supposed principal, or otherwise put it out of his own control, the mistake is discovered, and the lender gives notice to the agent, not to pay it, but return it, it then becomes money held to the use of the lender, and may be recovered back in *indebitatus assumpsit.* The ground is, that although the arrangement fails as a contract, yet it amounts to an authority from the lender to the agent, to pay it or apply it to the use of the principal, if delivered to him for that purpose, though under a mutual mistake as to his power to contract. But it is a naked power, in its nature revocable, and if the owner revoke the power and reclaim the money, the agent holds it as money received on a consideration which has failed, to the use of the lender, and if after that notice the agent parts with it, he does it in his own wrong, and is still liable for it to the lender. This rule will extend to a case where the agent has in fact received the money under such mutual mistake of the law, but has never, before such notice, accounted for it to his supposed principal,

nor otherwise changed his condition for the worse, towards his supposed principal, but has actually retained the money, or applied it to his own use.

If the plaintiffs think it expedient to go to a new trial on that ground, the question for the jury will be,

1. Whether the parties acted under a mutual mistake of the law, and were equally conusant of all the facts, on which the defendant's want of authority depended. The general law of the land, all parties are presumed to know; and the fact that both parties attended the same church and knew their plans and purposes in asking aid from the members, is proper evidence to be submitted to the jury upon the question whether they were equally conversant with the facts.

2. The other question will be, whether the defendant had in fact paid over the money, or applied and appropriated the same to the use of the Freewill Baptist Church, and thus put it out of his own control, before receiving any notice from the plaintiffs not to pay it, or any demand to have it repaid. If so, it cannot be recovered back; but if otherwise, it was money had and received by the defendant to the plaintiffs' use, and may be recovered in this action.

NEW TRIAL IN THIS COURT.

PERSONAL LIABILITY OF INDIVIDUAL CORPORATORS AND AGENTS FOR AN ULTRA VIRES TRESPASS.

THIRTY-SIXTH SELECTED CASE.

MILL v. HAWKER AND OTHERS.*

The members of a highway board, upon an allegation that a path across the plaintiff's field was a public highway, by a resolution passed at a board meeting, directed their surveyor to remove an obstruction placed across it by the plaintiff. The following day they gave him an order in writing to the same effect. He removed the obstruction accordingly, and the plaintiff thereupon brought an action of trespass against the members of the board who had concurred in the resolution, and the surveyor. There was no evidence that the path in question was a highway.

* Reported in L. R., 9 Ex., 309 (1874).

Held (by PIGGOTT and CLEASBY, B. B., KELLY, C. B., dissenting), that the action was maintainable.

By PIGGOTT and CLEASBY, B. B. First, that the resolution was unlawful altogether, inasmuch as it was beyond the province of the highway board, as a corporate body, to determine whether the path was a highway or not, and to direct the removal of an obstruction, and that the members who concurred in the resolution were therefore personally liable.

Secondly, that the circumstance that the surveyor was by 25 & 26 Vict., c. 61, s. 16, bound to obey the orders of the board did not excuse him if in obeying their orders he did an unlawful act.

By KELLY, C. B. First, that the action should have been brought against the board, the resolution and order having been corporate acts and within the competence of the board to perform, as being charged with the duty of maintaining the highways of their district in repair.

Secondly, that the surveyor, being bound by the statute to obey the orders of the board, was exempt from liability as being a mere ministerial officer.

DECLARATION.—Trespass by taking locks off the plaintiff's gates.

PLEA.—Not guilty by statute (5 & 6 Wm. 4, c. 50, s. 109; 25 & 26 Vict., c. 61, s. 9).

ISSUE.

The cause was tried before KELLY, C. B., at the Cornwall summer assizes, 1873. After the evidence was introduced on the part of the plaintiff it was objected that the defendants were not liable, and the court sustained the objections and directed a nonsuit.

In Michaelmas Term a rule was obtained to set aside the nonsuit and for a new trial on the ground of misdirection, in this that the learned judge ruled that the defendant members of the board, and the surveyor, were not individually liable.

In the Court of Exchequer, the judges differed in opinion. The following judgments were delivered in which the facts of the case and the questions of law will sufficiently appear:

CLEASBY, B.—The judgment I am about to read is that of my brother PIGGOTT and myself. There are two questions raised in this case. A trespass was committed upon the plaint-

iff by taking the locks off one of his gates, and the two questions are, first, whether the defendant Matthew Wickett is liable for the trespass; secondly, whether the other defendants (except Claudius Cregan Hawker) are liable. It was admitted that the defendant Claudius Cregan Hawker was not liable. The facts were that the plaintiff had caused a gate which crossed a footway on his property at Crapp's Park to be locked. It was alleged that this was a public footway, and the subject was brought forward at a meeting of the board of way-wardens or highway board of the Camelford highway district, held on or about the 29th of November, 1872. The defendant Hawker was clerk of the board, and all the other defendants except Wickett, were members of it, present at the meeting. The defendant Wickett was the district surveyor of the board.

It was sworn in answer to the usual interrogatories administered by the plaintiff to the defendants, that all the defendants (except C. C. Hawker and Wickett) being present at the board meeting, directed, or concurred in directing the defendant Wickett to remove the locks from the plaintiff's gate, and that the defendant Wickett did so on the day following the meeting by the directions of the board given at the meeting. Before the removal of the locks by Wickett he received from the clerk of the board the following letter:

"CAMELFORD HIGHWAY DISTRICT,
"30th of November, 1872.

"DEAR SIR—The Highway Board, at their meeting yesterday, ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Lesnewth; and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free use of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close said road.

"By order of the board.

"CLAUD. C. HAWKER, *Clerk.*

"MR. WICKETT."

At the trial it was objected on behalf of the defendants, that the action should have been brought against the highway board, and that the defendants were not personally liable. The learned judge who tried the cause admitted the objection, and nonsuited the plaintiff.

For the purpose of the present inquiry, the trespass having been proved and no justification proved, it must be taken that the removal of the locks was unlawful; if the objection had not prevailed, as matters stood, the plaintiff would have been entitled to a verdict. With regard to the first question, viz., the liability of Wickett, it appears to us that the general rule applies, and that a servant who does an act which is unlawful cannot justify it because it was done by the order of his master or employer. This rule applies as much to the servants of those who act in a public as in a private capacity. The mere fact of persons having a public office or employment (whether created by act of Parliament or not) does not take them out of the operation of the law and give to their acts any greater force or efficacy or to their servants any impunity. There is an apparent exception to this in the case of sheriffs or officers of courts of justice, who are excused if the judgment and process under which they acted are subsequently reversed, and the officers are still excused if they acted in the execution of the process. The defendants relied on this exception, and cases were referred to: See judgments in *Andrews v. Marris* (1 Q. B., 3), and *Dews v. Riley* (11 C. B., 434; 20 L. J. C. P., 264.) But there is no analogy between the case of the officer of a court of justice whose duty it is to give effect to the judgment of the court which, though erroneous, cannot be called illegal if the court have jurisdiction on the subject-matter, and a servant obeying the orders of his superior whose orders may be legal or not, as the case may be.

It is no doubt a hardship that an act of obedience to the orders of a public body should involve a responsibility; but the risk is small of public bodies (which act generally under advice) doing illegal acts, and the hardship is no ground for setting aside so fundamental a rule as that the person who himself does an illegal act becomes by doing so responsible,

and may be sued by the person injured without his looking any further.

There is nothing in the act of Parliament under which the surveyor is appointed to exempt him from liability. The effect of the sections relating to the appointment of surveyor (§§ 12 and 16) is to establish the relation of principal and agent or master and servant, between him and the highway board. The words of the 16th section, that he shall "in all respects conform to the orders of the board in the execution of his duties," cannot be read to mean that he shall be bound to obey the orders of the board whatever they are. Previous to this act of Parliament, the surveyor had been authorized to act upon his own judgment, but this enactment makes it his duty to abide by the directions of the board as his superiors in all matters relating to the repair of the roads. It is hardly reasonable to read it as importing that he is relieved from responsibility for whatever he does, provided he acts by their orders. The object is to regulate his conduct, and not to limit his responsibility to third persons.

As regards the other defendants who came to the resolution in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to show that in respect of corporate acts the individual members of the corporation cannot be sued: See *Attorney General v. Mayor of Liverpool* (1 My. & Cr., 171); *Attorney General v. Bailiffs of Retford* (3 My. & Cr., 484). There is indeed an express provision to this effect as regards the members of the highway board—but it is expressly limited to the lawful acts of the board—in s. 9, sub. 6, of the highway act, 25 & 26 Vict., c. 61. And it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them are

acting *ultra vires*, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion. And in this case unless the letter of the 30th November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the highway board given at the meeting, that is, of the 29th of November.

The cases of *Taylor v. Dulwich Hospital* (1 P. Wms., 655), and *Reg. v. Watson* (2 T. R., 199), may, however, be referred to in support of the proposition that the individuals really do the act; and in the case *Poulton v. London and Southwestern Ry. Co.*, and particularly in the judgment of BLACKBURN, J. (Law Rep., 2 Q. B., at p. 538), the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts. The highway board have authority to do what the surveyors would do under the previous act. They have all the powers, rights, duties, liabilities, capacities and incapacities of the surveyor (s. 11), and are to be deemed successors to the surveyor (s. 43, subs 3). It might be sufficient to say that in the case of a disputed footway the order to remove an obstruction could only follow upon something like a judicial act of the surveyor in determining whether there was or was not a public footpath, and he has no authority whatever to act judicially in such a matter. But a reference to the sections of the previous act, 5 & 6 Will. 4, c. 50, would show that the surveyor had no such power of removal. Section 72 does not apply at all, and s. 73 only enables the surveyor to remove any obstruction after he has obtained the order of a justice. In like manner, the power of a surveyor to remove encroachments is founded upon a convic-

tion under s. 69. *Keane v. Reynolds* (2 E. & B., 748). In reality, the right of a person to take the law into his hands and use force to remove an obstruction is founded upon this, that he is at the time using the highway as he is entitled to do, and that as he cannot use it without removing the obstruction, he is justified in doing so. And the precedents in pleading put it on that ground. There is no right to remove the obstruction as a retaliation upon the person who has put it there.

But a corporate body who orders the removal, and so uses force in determining a legal right, is in a different position. They do not want to use the road, and have not the justification of necessity in the exercise of a legal right; they can only justify it on the ground that they have come to the determination that the obstruction is illegal and ought to be removed, and they are not authorized to enter upon such an inquiry or form such a conclusion. It is the province of the justices to whom an application may be made to form such a conclusion.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the person who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the rate-payers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.

Sections 17 to 19 show what the office of the highway board is, and that it is a corporation for a particular purpose, viz., to do what is necessary to keep the highways in repair, and the provisions in s. 18 as to certain costs resulting from applications to justices being regarded as costs of the board in repairing the highway, and paid accordingly, show conclusively

to our minds that the damages and costs of defending an action of trespass such as the present would not be costs of the board in any way chargeable upon the parishes forming the board, or either of them. It would appear to be only right, if such damages and costs were payable at all, that they should be paid by the parish in which the road is situate, like the expense of repairing the road. And yet the persons who ordered the trespass might be the persons representing the other parishes in the district and not the parish wherein the road was situate. Just see what a strange state of things this would introduce. Section 20 provides that there shall be a district fund, and that the salaries of the officers of each parish, and all expenses incurred by the highway board for the common account and benefit of all the parishes in the district, shall be paid out of the district fund. This could not include these damages and costs, and they could not come out of the district fund. The section goes on to provide that the expense of keeping in repair the highways of each parish, and all other expenses in relation to such highways shall be a separate charge on each parish. It would certainly seem strange if the highway board had the power, by a resolution, of throwing upon a particular parish such a charge as that of paying the damages and costs of an action like the present, and unless they could do so there would be no fund out of which the damages and costs could be paid. When the parish denies the obligation to repair, s. 19 points out the course to be pursued. It appears to us that it is not the province of the highway board to contest the question whether a particular way is a highway or not, as the members chose to do by the resolution set forth at the beginning of this case. For the above reasons we think that, as the plaintiff was nonsuited, there ought to be a new trial in this case.

KELLY, C. B.—The highway board of the district of Camelford, in Cornwall, constituted and incorporated under s. 9 and other sections of 25 & 26 Vict., c. 61, upon the complaint of the churchwarden of the parish of Minster, that a highway in that parish and within the district had been obstructed by a locked gate thrown across it (as was alleged, contrary to the

statute), at a corporate meeting, duly convened and held according to the act, having investigated the matter of the complaint came to the following resolution, which was then and there entered on the minutes: "Resolved that the board having heard the complaint of the defendant, Mr. Mill" (the plaintiff in this action), "and the witnesses as well as Mr. White, the defendant's attorney, is of opinion that the road leading from Boscastle by the Wellington Hotel to Crapp's Park, is a public road, and that therefore Mr. Mill, the tenant, and Miss Hellyar, the owner of the land through which it passes, be served with notices to remove the obstruction they have created, and if the same be not removed on or before six o'clock of the 31st instant, the district surveyor remove the same." These notices having been given and disregarded, the surveyor removed the obstruction. The plaintiff re-locked the gates, and on the 29th of November another resolution was passed at a board meeting directing the surveyor again to remove the locks. This resolution was notified to Wickett, the district surveyor, and an order of the board signed by their clerk, forthwith to remove the obstruction was duly served upon him; and he proceeded in obedience to the order, to remove the locks from the gates, which was the trespass complained of in this action.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character, but against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting convened and held in strict conformity to the act of Parliament. No one member of the board assumed to exercise or did exercise any personal authority or power. The resolution was the act of the corporation and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, un-

less the act be maliciously done by the individuals charged, and the corporate name be used as a mere color for the malicious act, or unless the act is *ultra vires* and is not, and cannot be in contemplation of law, a corporate act at all.

In *Harman v. Tappenden* (1 East, 555), the Free Fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected, "That no action would lie to recover damages against individuals for acts done in their corporate capacity, and that *non constat*, but that all or some of the defendants might have voted against the order of amotion." When the case came before the court upon a motion to enter a nonsuit and in arrest of judgment, the court intimated very strong doubts on this ground how far the defendants were answerable in damages in their private character for acts done by them in their corporate capacity. And Lord KENYON, C. J., said that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington* (Carth., 171), and *Rex v. Mayor of Rippon* (1 Ld. Raym., 563), and added, "that he had many years ago moved for a *mandamus* to the master and fellows of Wadham College to compel them to put the college seal to a return which they were required to make, and to which Mr. Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences, but Lord MANSFIELD overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." LAWRENCE, J., expressed the same doubt, and finally upon cause being shown, the court held that without proof of malice, the action was not maintainable, and the rule was discharged: See also 1 Ventries, 351, and *Rex v. Windham* (1 Cowp., 377), the case alluded to by Lord KENYON.

It is true that where individuals make a pretended corporate act the cloak for a malicious libel or a libel on the administration

of justice, the court will grant a criminal information as in *Rex v. Watson* (2 T. R., 199). But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member, who, like Mr. Windham in the Wadham College case, may have been opposed to the act in respect of which the action may be brought. It was indeed once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyn's Digest, Franchises, F. (19). But besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable.

In *Yarborough v. Bank of England* (16 East, 6), the plaintiff recovered in trover for the unlawful detention by a clerk in the bank under its authority, of a Bank of England note. Can it be contended that an action could have been maintained against one of the directors of the Bank of England, who might have been present at the resolution that the clerk be directed to detain the note? In *Smith v. Birmingham and Staffordshire Gas Light Co.* (1 A. & E., 526), trover was held maintainable against the company (a corporation) for the wrongful seizure of a quantity of furniture by a bailiff under their authority. And in *Maund v. Monmouthshire and Staffordshire Canal Co.* (2 Dowl., N. S., 113), the plaintiff recovered in trespass for the seizing and converting under the orders of the defendants, certain barges and a quantity of coal. It was never suggested that in either of these cases the action should have been brought against the individuals who happened to be present when the act in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to show that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants execution might issue

for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the act by ss. 20–27, and others.

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*. If the board, by resolution, or otherwise, had accepted a bill of exchange directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and if any, to what, action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act is to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law.

Two cases have, however, been cited which seem to bear upon the question against the defendants. But the first, *Poulton v. London & South Western R'y Co.* (L. R. 2 Q. B., 534), merely shows that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand in the Dulwich College

case, *Taylor v. Dulwich Hospital* (1 P. Wms., 655), the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was *ultra vires* and not binding on the corporate body, and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which being *ultra vires*, was absolutely void.

The remaining question is whether Wickett, the surveyor, is liable to this action. The general rule, no doubt, is that one who does an unlawful act cannot justify himself by pleading the authority or direction of another. But here the surveyor is a public officer charged with the performance of various public duties, and bound by the express words of an act of Parliament to obey the orders of the highway board, the board themselves being a public body incorporated for public purposes and having public duties to perform, and who, in ordering their surveyor to remove the obstruction in question, have acted *bona fide* and within the general scope of their duties and authority under the act of Parliament.

To determine this question we must first consider the provisions of the act. By s. 17, "The highway board shall maintain in good repair the highways within their district; and it shall be the duty of the district surveyor to submit to the board an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district." And by s. 16, "The district surveyor shall act as the agent of the board in carrying into effect all the duties by this act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties; and the assistant surveyor, if any, shall perform such duties as the board may require under the direction of the district surveyor;" and then there are further provisions, already referred to, enabling the board to obtain funds for the performance of their duties and the carrying of the act into execution.

Now where all the public highways in any district are well known and ascertained no difficulty can arise in the execution

of the act. The surveyor inspects them and observes their condition; he makes his estimate of the expenses of repairing and keeping them in repair during the ensuing year, and delivers it to the board, who thereupon direct him to effect the repairs from time to time accordingly, and he obeys their directions. But where, as here, he finds a highway which requires or will shortly require to be repaired, but the owner of the land gives him notice that the land is his private property and is no highway at all, what is the course to be pursued? We may suppose that upon his report an order has been given him to repair the highway, and when he proceeds to do so he finds a locked gate thrown across it, and he makes a report to that effect to the board. They, the board, after communicating with the owner of the land and finding that the question is raised and must be determined, highway or no highway, must next consider how this may most conveniently be done. They may indict the land-owner for the obstruction, or they may do as they have done here, they may give him notice to remove the obstruction, and that in default of his doing so they will remove it themselves, and that he may try the question by bringing an action of trespass against them. They accordingly come to a resolution such as they have made here, and they give the order in question to the surveyor, and he in obedience to it removes the locks. If an action be then brought against the board they plead the highway, or defend under the general issue by statute, and the question is settled by the verdict of a jury and no difficulty arises. But if the law be that the land-owner may select the surveyor as a defendant, in what condition is he placed? The board have ordered him to effect the necessary repairs, and for that purpose to remove the obstruction. He looks to the statute and he finds that its language is imperative, "He shall in all respects conform to the orders of the board," "and act as the agent" of the board in carrying the act into effect. He has no means of ascertaining beforehand, or without the verdict of a jury, whether there is a highway or not, nor have the board themselves. He must therefore, at the risk of absolute ruin, obey the order as required by the act, or he must refuse obedience;

in other words he must disobey the order wherever a highway is in dispute.

The board cannot themselves in their own persons remove the obstruction any more than they can repair the highway. They must, therefore, either instruct their surveyor to act on their behalf or resort to some other mode, as by indictment, of raising the question, and if a public highway be established, perform their duty by putting it into repair.

I am not aware of any direct authority in reference to this act of Parliament. But there are cases which establish a principle within which I think this case may be well decided. In *Buron v. Denman* (2 Ex., 167), it was held by PARKE, B., after consulting the other judges of the Exchequer, that where a naval officer had committed a series of trespasses for which he was personally liable to an action for damages, but the Crown had afterwards ratified his acts, that the ratification was equivalent to a prior command, and the action against him could not be maintained. Baron PARKE himself had some doubts whether the ratification had that effect, but the judges, including Baron PARKE, were unanimous that the defendant, whose duty it was to obey the commands of the Crown, could not be made personally responsible in an action for the acts done in obedience to such command.

In *Andrews v. Marris* (1 Q. B., 3), the clerk of the court of requests, whose duty it was to issue warrants or writs of execution at the orders of the commissioners, having mistaken the effect of an order, issued a precept without an authority, under which the plaintiff was taken in execution, and he was held liable in trespass accordingly. But it was also held that Whetham, the other defendant, one of the serjeants of the court, and to whom the warrant was directed, and who actually made the arrest, was not liable to the action on the ground "that he was a ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they are founded upon valid judgments or are otherwise sustainable or not." It was further observed by the court that there would be something very unreasonable in the law if it placed him in the position of being punish-

able by the court for disobedience, and at the same time suable by the party for obedience to the warrant, and that "as the subject-matter of this suit was within the general jurisdiction of the commissioners, and the warrant appeared to have been regularly issued, the defendant Whetham was not liable."

It appears to me in this case the surveyor was in the exact position of Whetham in the case cited. *Dews v. Riley* (11 C. B., 434; 20 L. J. (C. P.), 264), was a similar case. There a void order of commitment had been made by a county court under which the clerk of the court made out a warrant of commitment, and the plaintiff was arrested by a bailiff under that warrant. It was held that the action was not maintainable, and the court observed that "the clerk was a mere ministerial officer to carry into effect the order of the judge, and cannot be liable in trespass for the performance of the duty cast upon him by the express language of the act of Parliament." And in *Keane v. Reynolds* (2 E. & B., 748), where trespass was brought, for pulling down a cottage which the magistrates had adjudged to be an encroachment within fifteen feet of the center of a highway, and convicted the plaintiff of having made the encroachment against the defendant who as surveyor of the highways, had pulled down the cottage in the supposed execution of the act 5 & 6 Wm. 4, c. 50, it appeared that the conviction was void, the way never having been repaired with stones or otherwise. But the court held that the defendant was not liable to the action "on the principle that the surveyor acted in obedience to the judgment of a court of competent jurisdiction which he was bound to execute."

It is true that in most of these cases the defendants who were held irresponsible were bailiffs or other officers acting in obedience or supposed obedience to the orders of a court or some legal tribunal made in the course of the administration of justice. But here, also, as in all these cases, the surveyor is a mere ministerial officer, bound by the express words of an act of Parliament to obey the orders of the board, and having no means of knowing or ascertaining whether such orders are valid and lawful or otherwise, and the board itself is a public

body, having public duties to perform and created and incorporated for public purposes. I know not, therefore, why this officer should not be protected by law as well as the subordinate officers of a court of justice.

It appears to me therefore upon the whole case that the defendants have acted throughout strictly within the scope of their authority and their duty. A complaint is made to the board that a highway is unlawfully obstructed. Upon investigating the case they find that an obstruction exists, but that it is disputed whether the spot is a public highway or not. Upon further inquiry they are advised and believe that it is a highway, and therefore that it is their duty to keep it in repair and free from obstructions. There are two modes in which this question, whether a public highway or not, may be raised and determined—by indictment and by action. They think, and I may venture to add I think also, that an action is preferable to an indictment, inasmuch as in a civil action points may be reserved, a motion made for a new trial, and appeals facilitated. They determine to try the question in that form accordingly. They give notice to the parties interested to remove the obstruction, and it is still persisted in, and the opposite parties are resolved to try the question. They hold a meeting and make the order in question, and it is executed, and we are now called upon to decide whether this action, in which a controversy between the board on behalf of the public and the owner of the land is to be settled, should be brought against individuals who have acted as they believe in the strict performance of their duty in holding and attending a meeting, and resolving in their corporate character that the necessary steps shall be taken, and who may possess no funds or means to meet the expenses of the suit, or to pay damages or costs, or against the board, who are charged with the duties, and intrusted with the powers, and provided with the funds necessary to the management of the highways within the district and to carrying all the purposes of the act into execution. The question as between the surveyor and the board is of equal importance, and is open in many respects to the same considerations.

I think therefore, and for the reasons I have assigned, that

the action should have been brought against the board, and that this action is not maintainable.

RULE ABSOLUTE.

NOTES.

A public agent does not always bind himself though he may not bind his principal.—In *Orgen v. Raymend*, 22 Conn., 379, the action was in assumpsit for services in teaching school, against the defendant individually, although he was a trustee of the school-district where the services were rendered. It was held that a trustee of a school-district who derives his official character from the general law and the election of the people, is a public officer; and that where such an officer assumes to contract as one of the trustees of the district, and for it, disclosing all the facts touching his supposed authority, or all that may be fairly inferred from his situation, he cannot be held personally liable on such contract. The court say: "We are aware that it is not infrequently laid down, as a rule of law, that, if an agent does not bind his principal he binds himself; but this rule needs qualification, and cannot be said to be universally true or correct, as the cases already cited abundantly show. If the form of the contract is such that the agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force and binds him as an individual; but if the form of the contract is otherwise, and the language when fairly interpreted does not contain a personal undertaking or promise, he is not personally liable, for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct, if he has knowingly or carelessly assumed to bind another without authority, or when making the contract has concealed the true state of his authority and falsely led others to repose in his authority." See, also, *Hodgson v. Dexter*, 1 Cr., 345; Story on Agency, 322; *Dauriman v. Jones*, 9 Jur., 454; *Polhill v. Walter*, 3 B. & A., 114.

A public agent or officer is not always personally liable because he does not so contract as to give a right of action elsewhere. Story on Ag., §§ 202, 237, 306; *Brown v. Austin*, 1 Mass., 208; *Dawes v. Jackson*, 9 Id., 490; *Adams v. Whittlesy*, 3 Conn., 560; *Entoe v. Hall*, 1 Hump., 303; *Macbeth v. Haldimand*, 1 Term, 172; *Nerwin v. Woolsey*, Id., 674. His personal liability attaches only where guilty of fraud or misrepresentation in reference to the authority. Id.

What parties dealing with an agent are presumed to know.—"The general doctrine in reference to corporate agents, whether general or special, is that parties dealing with them must take notice of such authority as is conferred upon them by the charter, organic act, articles of association, or other constating instruments, and perhaps the by-laws adopted by the corporate body in accordance with the organic or fundamental laws of its

constitution, for such laws are supposed to be public; and all parties dealing with corporate agents are presumed to have notice of the same." Field on Corp., § 202; *Adriance v. Roome*, 52 Barb., 399. "All persons dealing with the officers or agents of a corporation are bound to know that they act either under its charter or by-laws, or the usages which may be shown to exist defining the extent of their authority. They must in doubtful cases acquaint themselves with the extent of that authority, or otherwise submit to the consequences resulting from their omission to do that." DANIELS, J., in *Risley v. Indiana, etc., R. Co.*, 1 Hun., 202; *Ernest v. Nicholls*, 6 H. L., 419.

The case of *Jefts v. York, supra*, is to the effect that one acting as the agent of another when he is not, impliedly represents himself authorized so to act, and though he believes himself authorized, it is in the nature of a false warranty, and he is liable for the deceit in an action of tort.

See, also, *Hegeman v. Johnson*, 35 Barb., 200; *Noyes v. Loring*, 55 Me., 408; *Ballou v. Talbot*, 16 Mass., 461; *Bartlett v. Tucker*, 104 Mass., 336; *Duncan v. Niles*, 32 Ill., 532. But an agent is not liable in contract or tort where the principal would not be bound if the agent had authority. *Dung v. Parker*, 52 N. Y., 494; *Baltzen v. Nicolay*, 53 N. Y., 467, where it was held that the principal was not bound under the statute of frauds.

There is no wrong without a remedy.—There is a familiar maxim of the law that wherever there is a wrong there is a remedy; *ubi jus ibi remedium;* but we have noticed in some of the selected cases in Chapter XII and notes that municipal corporations have not always been held liable for trespasses and other torts done by officers or agents *colore officii*, or in the exercise of supposed duty and authority. And in some of the selected cases in this chapter we have noticed that the officers and agents of corporations have also been exonerated from liability where they have exceeded the authority of the corporation in executing contracts. And it appears, also, that in cases of the *ultra vires* trespasses and torts of agents there has been some difference of opinion among eminent judges as to the liability of the agent. But the better opinion would seem to favor the right of recovery of the agent in cases of positive torts committed by them in the execution, even, of duties supposed to be within the corporate powers, otherwise an injured party would be remediless. For if the corporation would be exonerated on the ground of the tort being *ultra vires*, and the agent, also, on the ground of the execution of a supposed duty, *colore officii*, the injured party would be without redress. In the case of contracts executed by agents on behalf of corporations they assume to represent, when there is no such corporation, or in case of contracts thus entered into when the subject-matter of it is beyond the power of the corporation, there would be more reason for exonerating the agent in a case free from fraud and deceit, the reason in support of such a doctrine being that the other party, as well as the agent, is presumed to have knowledge of the powers of the corporation, and to have equal means of determining the authority of the agent to bind the corporation which he represents. This reason, however, does not apply in cases of torts, and in such cases it would appear more consistent with the general

principles of the law applicable thereto to hold the actual perpetrator and wrong-doer liable therefor.

The general principle is that every tort-feasor is liable for the injuries resulting from his own acts, and this, although he may have acted innocently, or *bona fide* as the agent of another. But this does not apply to the executive and ministerial officers of courts of justice, as will be observed in the selected cases in this and the preceding chapter. See, also, *Dews v. Riley*, 11 C. B., 434; 25 L. J. (C. P.), 264; *Andrews v. Marris*, 1 Q. B., 3; Field on Dam., § 762. And in *Harman v. Tappenden*, 1 East., 555, corporations were held not personally liable for an *ultra vires* tort, directed by them to be committed at a corporate meeting in the corporate name. See, also, *Maud v. Monmouthshire, etc., Canal Co.*, 2 Dowl. (N. S.), 113.

It must be apparent that every tort is in one sense *ultra vires*, as corporations are not constituted to do wrong, nor is it any part of their express or incidental powers, but this is no defense to corporations if torts have been done by them or by their direction. See Ch. XII. But all parties who do a wrongful act, whether by instigation, direction or command of another, or not, must respond in damages for the injury thereby done to another. 1 Chitty on Plead., 147; 1 Hill. on Torts, 100; *Burnard v. Haggis*, 14 C. B. (N. S.), 45; *Filliter v. Phippard*, 11 A. & E. (N. S.), 347; *Bullock v. Babcock*, 3 Wend., 391; *Hatfield v. Roper*, 21 Wend., 615. And this doctrine applies even to infants and persons of unsound minds. Id. *Morse v. Crawford*, 17 Vt., 499; *Williams v. Cameron*, 23 Barb., 172; *Conklin v. Thompson*, 29 Barb., 218; Field on Dam., § 617 and notes. The *bona fides* of the act can only affect the measure of damages. Field on Dam., § 599.

CHAPTER XIV.

RETROSPECT, REVIEW, CONCLUSION.

History and growth of the doctrine.—It has been truly asserted by an eminent English author that "the doctrine of *ultra vires* is of modern growth." Brice's Preface to *Ultra Vires*. He says: "Its appearance as a distinguished fact, and as a guiding or rather misleading principle in the legal system of this country, dates from about the year 1845, being first prominently mentioned in the cases, in equity, of *Coleman v. Eastern Counties Railway Company*, in 1846; *ante*, p. 190; 10 Beav., 1; 16 L. J. (Ch.), 73; and at law, of *Eastern Anglian Railways Company v. Eastern Counties Railway Company*, in 1851; *ante*, p. 9; 11 C. B., 775; 21 L. J. (C. P.), 23.

Long before this time, however, it had been recognized in this country as a corporate doctrine, and established as a part of American jurisprudence. As early as 1804 it was discussed in the case of *Head v. Providence Insurance Company*, 2 Cr., 127; and the doctrine was recognized in 1817 in *Buckley v. Derby Fishing Co.*, 2 Conn., 252; in 1818, in *People v. Utica Insurance Co.*, 15 Johns., 352; in 1824, in *Firemen Ins. Co. v. Sturgis*, 2 Cow., 664; in 1827, in *Bank of United States v. Dandridge*, 12 Wh., 64; in 1829, in *Beach v. Fulton Bank*, 3 Wend., 575; in 1839, in *Bank of Augusta v. Earle*, 13 Pet., 519; in 1844, in *Barry v. Merchants' Exchange Co.*, 1 Sand., Ch., 280; in 1850, in *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How., 172; and since that

time in many cases, both selected and referred to, in the foregoing chapters. Having been thus recognized and early rooted as a scion of corporate law in this country, it has become an important doctrine in our jurisprudence relating both to private and municipal corporations, although the application of the doctrine has been somewhat restrained and limited by the requirements of commercial law and the application of equitable principles in the dispensation of justice.

The doctrine has been frequently, as we have seen, characterized as *odious, ungracious* and *unwelcome;* and it is manifest that in its unqualified and rigid application, it frequently overrides the fundamental principles of equity; as for example, where the corporation is permitted to ignore an *ultra vires* contract, and at the same time retain the property or other consideration received under it.

The original doctrine, however, it is gratifying to notice, has been so moulded and qualified by the courts that it has lost much of its frigid and austere character, and is, year after year, being limited in its application by the requirements of the commercial law and the enforcement of the precepts of equity and the principles of common justice.

Conflict in the decisions.—The limitation, in the application of the doctrine to corporate commercial paper, has, in this country, become very well settled by the decisions of both federal and State courts; but there has been, and still is great uncertainty in its application in a variety of other cases. The reports abound with inconsistencies and irreconcilable conflicts in the application of the doctrine. This uncertainty is referred to by Mr. BRICE, in his preface to the first edition of his valuable work on *Ultra Vires*. He says: "It is *ultra vires* of the great Eastern Railway Company to run steam packets from Harwich (*Coleman v. Eastern Counties Railway Company*, 10 Beav., 1; *ante*, p. 190); but not of the South Wales Railway Company to run them from Milford Haven. (*South Wales Railway Company*, 10 C. B. (N. S.), 675.) It is *ultra vires* of a steamship company to sell the whole of its vessels except two (*Gregory v. Patchett*, 33 Beav., 597); but perfectly legal thus to dispose at one swoop of every one

of them. (*Wilson v. Miers*, 10 C. B. (N. S.), 348.) It is *ultra vires* of railway companies to enter into partnership (*Charlton v. Newcastle and Carlisle Railway Company*, 5 Jur. (N. S.), 1097), but not *ultra vires* to make arrangements for dividing the whole of the joint profits among themselves in fixed proportions. (*Hare v. London and Northwestern Railway Company*, 2 J. & H., 80.) It is *ultra vires* of the town of Southampton (*Attorney-General v. Andrews*, 2 Mac. & G., 225), or Sheffield (*Reg. v. Mayor, etc., of Sheffield*, L. R., 6 Q. B., 652), to incur expenses in order to obtain a proper supply of water for their respective inhabitants, but not so for Ashton-under-Lyne (*Bateman v. Mayor, etc., of Ashton-under-Lyne*, 3 H. & N., 323, or Wigan, *Attorney-General v. Mayor, etc., of Wigan*, 5 DeG., M. & G., 52), to do exactly the same thing."

The decisions of the American courts have furnished some irreconcilable conflicts in the application of the doctrine, as will be noticed in the cases selected for this volume. Conspicuous among these are those that relate to the contracts and torts of corporate carriers, beyond their chartered lines. See *ante*, Ch. III, and notes. The doctrine applicable to such cases is now, however, very well settled by a great preponderance of authority, if not quite uniform decisions, and the plea of *ultra vires* is no longer tolerated to enable corporate carriers to avoid their contracts, or defeat a recovery of damages for their tortious acts in such cases.

Municipal ultra vires torts.—There is another class of cases, as will be noticed, *ante*, Ch. XII, and notes, where there is a distinction drawn that would appear exceedingly fine and technical.

In *Horn v. The City of Baltimore*, *ante*, page 508, the suit was brought to recover damages done to a certain lot by reason of the grading of a certain avenue, which it was averred the city had no authority to grade. It was held in a former case against the city that the city had no right to grade the avenue (*Porter's Case*, 18 Md., 284), and it was stipulated that the record in said case might be used in this. It appeared in that case that the mayor and city council of Baltimore were author-

ized to have the avenue graded and paved on the application of a "majority of the front feet owners" of the land on both sides of said street, "if in their opinion consistent with the public good." The city commissioners, acting for the mayor and city council, on the application of a majority of front feet of the owners, proceeded to have the avenue graded; and this action, if not previously directed, was subsequently approved by an ordinance which also declared that the work was consistent with the public good. The complainant filed a bill to restrain the defendants from selling his land for the payment of the taxes levied to pay for the grading, and an injunction granted therefor was made perpetual. Although that case was for an injunction to restrain sale of land, the court in this case, although for a tort of the city through its agents, or officers, done *colore officcii*, and which, if not positively directed, was subsequently approved and adopted, held that the city was not responsible therefor.

In the case of *Lee v. Sandy Hill*, *ante*, page 513, the charter of the defendant provided that the village of Sandy Hill, the defendant, should have five trustees as officers, and that they should be commissioners of highways; and they, by virtue of their office, had authority to "lay out or alter any street or highway, through or upon any garden, orchard, yard or other lands in the village." Under a written resolution and order of such trustees the overseers of highways wrongfully entered upon the land of the plaintiff and moved back a fence erected by him in front of his lot, the trustees erroneously supposing the plaintiff's fence was an encroachment upon the street. In a suit by the owner against the village to recover damages therefor, it was held that he could recover. The distinction between this case and *Hone v. The City of Baltimore*, *ante*, consists in the fact that the court in the latter case held the city had not, by its mayor and council, previous to the grading caused to be done by its commissioners of streets, determined by any resolution entered upon its minutes at any of its meetings, that such action was consistent with the public good, as provided by the statute, although they did by such resolution afterwards so declare, and approve of the grading.

In *Thayer v. City of Boston*, *ante*, 525, Chief Justice SHAW

laid down the broad doctrine that a municipal corporation may be liable in an action where wrongful acts are done by its authority, in all cases which would warrant like action against an individual, provided such act is done by the order or authority of the municipality, or of those branches of it which are invested with jurisdiction to act in the premises, "or where, after the act has been done, it has been ratified by the corporation."

The distinction drawn between this case and *Horn v. The City of Baltimore*, *supra*, is this, that in the latter case the city had no authority to direct the grading to be done until it was determined by the mayor and city council of the city of Baltimore that the grading was consistent with the public good, the court holding that this should be declared by the board at some meeting and entered upon the minutes; and that the city could not approve of the wrongful acts of the commissioners in grading the avenue when it had no authority, through the mayor and councilmen, to direct the grading to be done in the first instance, until such a record was made. Whereas, in *Thayer v. The City of Boston* the officers of the city who committed the trespass had general authority over the streets and highways of the city, and the acts done they professed to do by virtue of their offices and for the benefit of the city. Not only this, but they were, it would appear, approved by the city. The distinction between these cases is fine and it is well to be observed.

The doctrine of *Thayer v. City of Boston* is followed in *Sheldon v. Kalamazoo*, *ante*, page 530. But see *contra*, notes, *ante*, page 538, *et seq.*

The nice distinction drawn in the case of *Horn v. City of Baltimore* was also made in *Morrison v. City of Lawrence*, *ante*, page 535. From a statement of facts in that case it would appear that the statute of the State of Massachusetts provides that the city councils of cities in that State may appropriate money to celebrate a holiday by a "vote of two-thirds of the members of each branch of the city council present and voting by a yea and nay vote."

It appeared from the evidence that an order was adopted by both branches of the city council for the appointment of a

joint committee, " to cause the approaching fourth of July to be observed in the city with salutes, ringing of bells, music upon the common, and such other manner as they shall deem expedient, and that the expense thereof be charged to the incidental department and that the committee have full power." The official record of the clerk did not show that this order was adopted by a " vote of two-thirds of the members of each branch of the city council present and voting by yea and nay vote."

The committee were appointed, with the mayor for chairman, and the expenses of the celebration, including $376 for fire-works, was $646.24. The action was for an injury sustained by the negligent firing of a rocket by the defendant's servant, which was bought by said committee and used under their direction during the celebration. The plaintiff offered to prove on the trial by oral testimony that two-thirds of each branch of the city council did, in fact, vote for it. BIGELOW, C. J., held that before the enactment of the statute referred to the appropriation of money for the purpose of celebrating a holiday was illegal; that the authority given by the statute was a limited one and could only be exercised in pursuance of a two-thirds' vote; that the only competent evidence of the action of the city council was the records, which, it was provided by the statute, the clerk should keep; that parol evidence was not admissible to prove any action or proceedings of the city council; that there was no legal evidence to show that the defendant had purchased fire-works or authorized any person to use them; and that as the act of the mayor and other officers of the city was beyond the scope of their authority, the city could not be held liable in damages for the injury sustained by the negligent discharge of the rocket. See, also, notes, *ante*, page 540, 541. But see, also, notes, *ante*, page 546, *et seq.*

There seems to be a distinction drawn between the liability of a corporate agent who executes an *ultra vires* contract and when he commits an *ultra vires* tort. In the former case his liability is made to depend upon the question whether he has used fraud or deceit in procuring the execution of the contract. If the question of power of the corporation to make the con-

tract, on which the power of the agent also depends, is fixed and determined by the provisions of the charter, or other constating instruments, this, in the absence of fraud, is presumed to be known to all parties dealing with the corporation or its agents, and the party contracting with them does so at his peril, without any right of redress on the agent. This doctrine would appear to be established by the case of *McCurdy v. Rogers*, *ante*, page 548, and by *Jefts v. York*, *ante*, page 554.

But in cases of *ultra vires* torts of agents it would appear well settled by reason and authority that agents may always be held personally liable for the damages sustained thereby. See *Mill v. Hawker*, *ante*, page 559, and notes.

A retrospect of the selected cases and of the cases cited in this volume shows the early doctrine of *ultra vires* has been considerably modified by the principles of the law merchant, by the doctrine of estoppel, and especially by the just and equitable doctrine which has denied its application to cases where the corporation has received the consideration and the benefit of a contract which it seeks to repudiate, or which permits in such case a recovery of the consideration thus received.

There is a class of cases where the application of the doctrine is always just and beneficent. I allude to its application in suits in equity to restrain the execution of *ultra vires* acts. The right of a party to restrain *ultra vires* acts is universally recognized. This is illustrated by the selected cases in Chapter V, *ante*, page 190, and notes, page 224, *et seq.*

Thus a stockholder may restrain the *ultra vires* acts of directors even though opposed by all the other stockholders; he may restrain the corporation from increasing the capital stock of the corporation beyond the limit fixed in the charter, or articles of incorporation. *Railway Company v. Allerton*, 18 Wall., 233; *ante*, note, page 224; or a party from disposing of property fraudulently conveyed to him by the corporation, but in such a case the stockholder is required to act promptly, as by delay he may be held to have acquiesced in the proceedings. *Samuel v. Holliday*, 1 Woolw., 400; note, *ante*, page 225.

So a stockholder may restrain the collection of an illegal

tax; the unauthorized issuing of stocks; the voting upon illegal stocks; the application of funds to the unauthorized extension of railroads; and generally the engagement in enterprises by the corporation or its officers not authorized by the charter. See *ante*, notes, pages 229, 230, 231.

In such cases the practice is just and proper. In most cases parties interested could avail themselves of this preventive remedy, which if neglected might in various complications leave them remediless.

Quo warranto—construction of grants.—The right of the State to proceed by *quo warranto*, in case of *ultra vires* acts of private corporations is also universally recognized. But such a remedy has no application to municipal corporations. These must still be allowed to perform their public functions notwithstanding they may, through their agents or officers, exceed their powers or violate their duties. And we have noticed that a distinction seems to be made in their favor, over private corporations, in the application of the doctrine of *ultra vires*, to common contracts and torts.

The right to declare a forfeiture for either misuser or nonuser of franchises conferred by the State on a corporation is held to result from the very nature of its existence, and a tacit condition annexed to the charter of every corporation. *Muma v. Potomac Company*, 8 Pet., 287; *Truett v. Taylor*, 9 Cr., 43. The corporators are required to act up to the end and design for which the corporation was created, and either by neglect of this duty or abuse of the powers conferred, the charter may be forfeited on a proper proceeding by and in the name of the State, as for a condition broken or a breach of trust. *The Commonwealth v. Commercial Bank*, *ante*, 319; *Attorney General v. Petersburgh & Roanoke R. Co.*, 6 Ired., 461.

It has already been observed, however, that it is not every act of abuse or misuser, that will justify a judgment of forfeiture. What acts would be sufficient for this purpose cannot be specifically stated. But it is certain that the abuse must be a plain abuse of the powers conferred, and a construction of a charter unfavorable to the corporators ought not ordinarily to be indulged in cases of uncertainty and doubt.

But it is a general rule of construction that all grants of franchises from the State, and all limitations and conditions in charters or the statutes providing for incorporation, and under which corporations are created, are to be construed most strictly in favor of the public and against the grantee, in order to protect the public against improvident grants, and claims of powers by implication where the right is not clear; and such grants, it is held, should not be maintained by doubtful language; but still they should receive such reasonable construction as not to defeat the will of the legislature. *Providence Bank v. Billings*, 4 Pet., 514; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; *Bank of Augusta v. Earle*, 13 Pet., 519; *Perrine v. Chesapeake & Del. R. Co.*, 9 How., 172; *Richmond R. Co. v. Louisana R. Co.*, 13 How., 71; *Pennock v. Coe*, 23 How., 117; *Rice v. Railroad Co.*, 1 Black, 358; *Delaware Tax Cases*, 18 Wall., 206; *Aicardi v. The State*, 19 Wall., 635; *Turnpike Co. v. Illinois*, 6 Otto (U. S.), 63; *In re N. Y. & H. R. Co.*, 46 N. Y., 546; *Rens. & Sara. R. Co. v. Davis*, 43 N. Y., 137; *Auburn Plank Road Co. v. Douglas*, 9 N. Y., 444; *Mohawk Bridge Co. v. Utica & Schenectady R. Co.*, 6 Paige, 554; *Packer v. Sunbury & Erie R. Co.*, 19 Pa. St., 218; *Bank v. Commonwealth*, 19 Pa. St., 144; *Pennsylvania R. Co. v. Canal Commissioners*, 21 Pa. St., 9; *Commissioners v. Erie & N. E. R. Co.*, 27 Pa. St., 339; *Black v. United Companies*, 7 C. E. Green, 130; s. c., 9 Id., 455; *St. Clair Turnpike Co. v. The People*, 82 Ill., 174.

Special charters limited by general laws.—Whether the question of corporate power is presented in a proceeding by *quo warranto*, or on a plea of *ultra vires*, the decision, it will be noticed, may turn upon the construction of the charter or general acts of incorporation as well as other statutes, and presumptions arising therefrom; and questions of public policy may, also, influence it. Thus it has been held that in construing a special act of incorporation, there would be a presumption that the legislature did not intend to exempt it from the operation of such general laws of the State as were applicable to such corporations, and which would otherwise give it an unreasonable monopoly and privileges inconsistent with

constitutional principles. *De Lancy v. Insurance Co.*, 52 N. H., 581. And where such an act provided that the corporation might dispose of property "in any manner they deem best," it was held that this did not authorize them to dispose of their property by a lottery, where lotteries were prohibited by the general laws of the State. *State v. Krobs*, 64 N. C., 604.

Where a charter provided that the corporation might loan moneys and receive and take the management of securities "upon such terms and for such commissions, in addition to interest, as shall be stipulated and agreed upon by and between the said company and the parties receiving the loan or advance," it was held that this did not authorize the corporation to make loans which are usurious in fact, under the cover of commissions. *Caldwell v. Commercial Warehouse Co.*, 1 Hun., 718; *Johnson v. Griffin Banking, etc., Co.* 55 Ga., 691; *Tyng v. Commercial Warehouse Co.* 58 N. Y., 308., So where a charter authorized a company to carry on a stock yard, it was held that this did not authorize the carrying on of the business in a way to materially injure others in their health, comfort or property. *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq., 296. It will thus be noticed, that grants of franchises to corporations and the powers, duties, and liabilities of corporations, may be limited, extended or qualified, by the general laws of the State. See also, *Penobscot Boom Corporation v. Lamson*, 16 Me., 224; *Michigan Bank v. Gardner*, 15 Gray, 362.

Implied authority of corporations.—It will be apparent from many of the selected cases herein, that corporations have implied authority, where it is not expressed in the charter or in general statutes on the subject, to make all the necessary arrangements for the proper execution of the enterprises for which they were incorporated, and carry on and transact such business, being ancillary to it, as may be carried on and transacted by natural persons under similar circumstances. Every corporation may by the terms of its creation, buy and sell, and take and grant property, and contract obligations, in the same manner as an individual, who is competent to make

contracts, and is bound by the same implications, presumptions, and inferences as natural persons. *Tapping v. Beckford*, 4 Allen, 120; *Kitchen v. Cape Girardeau, etc., R. Co.*, 59 Mo., 514; *Bates v. Bank of Alabama*, 2 Ala., N. S., 451; *Reynolds v. Stark*, 5 Ohio, 205; *Brady v. The Mayor etc.*, 1 Barb., 584; *New England Fire and Marine Ins. Co. v. Robinson*, 25 Ind., 536; *Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co.*, 5 Wis., 173; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St., 339; *Macon v. Macon., etc., R. Co.*, 7 Ga., 221.

For instance, in England it has been held that railroad corporations had the power, as incidental to their primary business, to put up refreshment rooms, stations and coal depots; *Flanagan v. Great Western R. Co.*, L. R., 7 Eq , 116; *Cochin v. Midland R. Co.*, 2 Ph., 469; *Eastern and Western, etc., R. Co. v. Dawes*, 11 Hun., 363; and in this country, an opinion has been given, that such a company may put up a telegraph along the line of its road, as incidental to the business for which it was created. *Western Union Telegraph Co. v. Rich*, 19 Kan., 517.

Corporate carriers.—In its application to corporate carriers the doctrine of *ultra vires* has been, as we have noticed, considerably modified and restricted. If the original doctrine were strictly applied in such cases the corporate carrier could not be held liable for its torts committed, where it had no authority to carry on its business under its charter, or on its contracts to carry beyond the *termini* of its chartered route. In case of charters granted to carriers, the particular line and *termini* of the route is usually expressed in it or in the articles of association under general statutes providing for the organization of corporations, and any undertaking or contract made to carry beyond these would appear to be beyond the authority conferred, and of which the party contracting with the corporation might, according to decisions in other cases, be presumed to have knowledge. The fundamental and elementary principle in reference to the doctrine of *ulrta vires* is, that the power of a corporation is limited to that conferred by the charter, and such as are necessarily incidental thereto. In the

case of contracts of corporate carriers to carry beyond the line or the *termini* of their roads, it would appear that such contracts were not within the corporate powers, and that they would, therefore, be void. See *ante*, pp. 103–113.

The same may be said of the torts of common carriers where they occur by the negligence of their agents and servants in operating routes beyond their corporate lines, or where they occur by the negligence of the agents or servants of other carriers on other routes with which they have connections and contracts for continuous carriage. See *ante*, pages 111, 112. Notwithstanding this we find the courts have held, and the great preponderance of modern authority sustains the doctrine, that the corporate carrier is not only liable on such contracts, but also for damages sustained by such negligence. See *ante*, pp. 112–116.

The legality of the contract and the liability for the tort in such cases have sometimes been made to rest upon the implied or incidental powers of the corporation. Thus, in *Mayor of Norwich v. Norfolk Railway Company*, 4 E. & B., 446, Lord CAMPBELL held, that railroad companies had certain powers unconnected with locality; that as to acts territorial in their character, such as the purchase and holding of real estate, the construction of the railway depot, and the like, they can be upheld if done without the limits of the territory within which the corporation is permitted to act, for the reason that they may tend to advance the objects of the corporation, to increase the traffic upon the railroad, or increase the profits of the shareholders, and, therefore, in furtherance of the main purpose of the corporation. See, also, *Coleman v. The Eastern Counties Railway Company*, 10 Beav., 15; *Muschamp v. Lancaster & Preston Junction Railway Company*, 8 M. & W., 421; *Carey v. Cleveland & Toledo Railway Company*, 29 Barb., 35, *ante*, pp. 113–116.

The reasons above set forth would be equally applicable to a contract of a corporate carrier to carry beyond the terminus of its chartered route; and certainly the tendency of modern decisions is to sustain such contracts as valid, where it is auxiliary and beneficial, as an incidental power, reasonably necessary to the proper execution of the legislative grant; and it

therefore follows that they may thus become liable for the negligence and other torts of other carriers. *Noyes v. Rutland & B. Railway Company*, 27 Vt., 110; *Railroad Company v. Transportation Company*, 16 Wall., 324; *ante*, pp. 112, 113, and the opinion of COMSTOCK, CH. J., in *Bissell v. The Michigan Southern & Northern Indiana Railway Company*, *ante*, p. 116.

We have noticed that in case of misuse, abuse, or nonuser of the corporate franchises, the State may reclaim the charter, *ante*, p. 586.

So, also, shareholders may recover damages against officers and agents who have wrongfully diverted the capital to purposes not authorized by the charter, *ante*, pp. 116, 119. Moreover, if private corporations, in excess of their chartered powers, by their agents and servants, do acts not authorized by their charters, such acts done by their direction and for their benefit, are regarded as the acts of the corporation, and if in the performance of them such officers or agents are guilty of negligence by which others are injured in person or property, the corporation is liable therefor. Opinion of SELDEN, J., in *Bissell v. The Southern Michigan & Northern Indiana Railway Company*, *ante*, p. 163. But it has been denied that this doctrine is applicable to municipal corporations. *Horn v. City of Baltimore*, *ante*, p. 508.

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